THE SENATE OF CANADA

ITS

CONSTITUTION, POWERS AND DUTIES

HISTORICALLY CONSIDERED

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BY

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PREFACE

THE titles of the different chapters of this book indicate what I aimed to accomplish in discussing the "Constitution, Powers and Duties" of the Senate of Canada. My object has been not so much to justify the record of the Senate for the past forty-five years, as to show that to differ from the Lower Chamber is not necessarily an offence against the Constitution or the assertion of an independent judgment for which it has no authority from the people, by whom it was constituted, jointly with the House of Commons, parliamentary trustee for the nation.

G. W. R.

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INTRODUCTION

REPRESENTATIVE Government, when first conceded to the British North American Provinces by the Imperial Parliament, was in every instance vested in an elective Legislative Assembly and an appointed Legislative Council, with the Governor-General or Lieutenant-Governor, as the case might be, representing the Crown. The Colonial Office held its representative strictly responsible for the administration of the Province. He was his own Prime Minister. He appointed his own Executive, without any regard to the Legislative Assembly. He also appointed the Legislative Council, and, in utter disregard of the independence of Parliament, elevated to that influential position many public officers who were on the monthly pay list of the Government and under its control. In 1834, out of thirty-one Members of the Legislative Council, eighteen held office under the Government.

Between the Legislative Council and the people, as might be expected, there was no bond of sympathy or interest. To carry out the behests of the Governor and his Executive appeared to be the only obligation which it

recognized. If the Legislative Assembly passed any measure distasteful to either, the Council generally refused its assent. The only purpose it appeared to serve was to relieve the Lieutenant-Governor from the odium of exercising his prerogative for the same purpose.

In the eight years prior to 1837 the Legislative Council rejected 325 Bills sent up by the Assembly, or an average of forty a Session.[1]

A Legislative Council so constituted could not fail to forfeit the confidence of the Assembly and the Electorate, and at different times its conduct was severely criticized, and even remonstrances were sent against its arbitrary methods to the Colonial Office. In the Seventh Report of the Committee on Grievances, appointed by the Legislative Assembly of Upper Canada, it is referred to in the following terms:—

> The Legislative Council, as at present constituted, has utterly failed, and never can be made to answer the ends for which it was created, and the restoration of legislative harmony and good government requires its reconstruction on the elective principle.[2]

[1] See *Makers of Canada* (G. G. S. Lindsay), p. 73.

[2] Lord Broughton, in *Recollections of a Long Life*, reports the following conversation between the King (William IV.) and Lord Gosford, Governor-General of Canada: "The King said to Lord Gosford: 'Mind what you are about in Canada. By G—d! I will never consent to alienate the Crown lands, i.e. to make the Council elective. Mind me, my lord, the Cabinet is not my Cabinet; they had better take care, or, by God! I will have them impeached. You are a gentleman, I believe. I have no fear of you; but take care of what you are about.'"

The Legislative Assembly of Lower Canada in 1834 adopted a series of ninety-two Resolutions, complaining of the administration of the Government. Among others was the following:—

21. Resolved that the Legislative Council of this Province has never been anything more than a mere screen between the Governor and the people, which, by enabling the one to maintain a conflict with the other, has served to perpetuate a system of discord and contention; that it has unceasingly acted with avowed hostility to the sentiments of the people, as constitutionally expressed by the House of Assembly.

Lord Durham, in his Report, also referred to the Legislative Council.

The composition of the Legislative Council will certainly be admitted to have been such as could give it no weight with the people or with the representative body, on which it was meant to be a check. The majority was always composed of Members of the Party which conducted the Executive Government.

The clerks of each Council were members of the other, and, in fact, the Legislative Council was practically hardly anything but a veto in the hands of public functionaries of all the acts of the popular branch of the Legislature, in which they were always in a minority. This veto they used without any scruple. The Legislative Council in the Maritime Provinces seemed to be constituted on a similar basis. The Legislative Council, or Second Chamber of all the Provinces, was composed of the direct nominees of the Crown, and these were chosen from the wealthy or official classes, so as to be devoted to

maintaining the interests of the Executive. The Lieutenant-Governor acted under a Commission, which gave him much control, and therefore, though a Legislature existed necessarily for the purpose of law making, it did not for a moment possess the power of determining the political complexion of the policy of the Executive.

In *The Makers of Canada* (Joseph Howe), Mr. Justice Longley (p. 14) refers to the Legislative Councils of the Maritime Provinces as follows:—

. . . The real functions of government were in the hands of a privileged class, and the great mass of the people was permanently excluded from all hope of participating therein.

The persistent obstruction by the Legislative Council of the work of the Assembly conduced in no small degree to the irritation which led to the Rebellion of 1837. But, notwithstanding the experience of a nominative Legislative Council under representative government, when responsible government was conceded, as it was in Canada by the Union Act of 1841, and shortly after in all the Provinces of British North America, the nominative system was continued; but its tendencies to thwart the wishes of the popular Assembly were greatly modified. The appointments to the Council were made by responsible Ministers, and office holders were no longer conspicuous among its members. Though

it still claimed the right of independent judgment, it ceased at all events to be the political bodyguard of the Lieutenant-Governor. Nevertheless, either because it inherited the obstructive traditions of its predecessors under the old regime, or because it could not bring itself into sympathy with the progressive spirit of the Assembly, the electors of the Upper Provinces clamored to make it elective. Lord Elgin expressed himself strongly in favor of such a change, and in 1855 the Imperial Parliament yielded to popular demands. The old Members, being appointed for life, were allowed to retain their seats, so that for several years the Legislative Council was composed of two classes of Members, the nominated and the elected. In 1865, when the Quebec Resolutions were before the Council, there remained still twenty-one Life Members to express an opinion on the changes in the Constitution which these Resolutions recommended. It is worthy of note that of the twenty-one Life Members only three voted against the Federation proposed by the Government.

From the short experience of the elective system in the United Provinces of Upper and Lower Canada, it is impossible to say to what extent it was calculated to promote harmony between the two Houses. On one occasion, at

least, a Supply Bill would have been rejected were it not for the presence of Life Members. At all events, the Delegates at the Quebec Conference from Canada, partly out of consideration for the views of the Delegates from the Maritime Provinces, unanimously concurred in adopting the nominative system,[1] based upon the recommendation of the Provincial Governments.

This middle course, however, of which the Quebec Conference approved, was afterwards changed by the Delegates who met at London to confer with the Colonial Secretary for the purpose of drafting a Union Bill to a direct nomination by the Crown on the recommendation of the Governor-General and his advisers. In that position the Legislative Council, now styled the Senate, stands to-day.

[1]Speaking on the constitution of the Legislative Council, the Hon. A. Mackenzie is reported in *Confederation Debates* (pp. 425-6) as follows: "It is said that there has been a retrograde movement in going back from the elective to the nominative system. I admit that this statement is a fair one from those who contended long for the application of the elective principle to the Upper House; but it can have no weight with another large class, who, like myself, never believed in the wisdom of electing the members of two Houses of Parliament with co-ordinate powers. I have always believed that a change from the present system was inevitable, even with our present political organization."

THE SENATE OF CANADA

CHAPTER I

EVOLUTION OF THE BRITISH NORTH AMERICA ACT

In tracing the evolution of the British North America Act I propose confining myself entirely to declarations in favor of the Union of the British North American Provinces made in Parliament. Among these I include the Report made by Lord Durham on the troubles in Canada, laid before the Imperial Parliament in 1839. There may have been casual utterances by men occupying official positions in Canada and in the Maritime Provinces prior to that time, but of these I take no notice. I am assuming for my purpose that Lord Durham's declaration was the first official announcement that a Federal Union such as we now have was practicable. I quote from his Report, edited by Sir C. P. Lucas.

> Such a union would at once decisively settle the question of races. It would enable all the Provinces to co-operate for a common purpose, and, above all, it would form a great and powerful people, possessing the means to procure a good and responsible Government

for themselves, which, under the protection of the British Empire, might in some measure counterbalance the preponderance and increased influence of the United States on the American continent. . . . If we wish to prevent extension of this influence, it can only be done by raising up for the North American colonist some nationality of his own. By lifting these small and unimportant communities into a society, having some objects of national importance; and by this, giving their inhabitants a country, which they would be unwilling to see absorbed, even into one more powerful.

In 1839 Mr. J. W. Johnson, a Member of the Legislative Council of the Province of Nova Scotia, in a speech of considerable force, invited the Council to consider the advantages of a Confederation of the Maritime Provinces. So far as I have been able to ascertain, this was the first utterance of the kind ever made within the halls of any Parliament in the British North American Provinces. He said:

Supposing that the interests of each Province could be preserved, and the Local Legislatures as now, would the Union of the five Provinces for the purposes of a General Government be injurious? The Union would confer the power of removing many evils which now exist; for instance, in the monetary system, and the regulation of trade and revenue, which required a general arrangement, which was very difficult at present. If the means could be found for carrying on the Government suggested, he had no doubt it would be beneficial. . . . If the Provinces were to develop their resources, strength to do

so could be given, and it was self-evident that union is strength.

Again, in 1854, as leader of the Legislative Assembly of Nova Scotia, Mr. Johnson introduced into the Lower House the following Resolution:

Resolved that the Union or Confederation of the British Provinces on just principles was calculated to perpetuate their connection with the parent State, while their advancement and prosperity would increase, and their strength and influence elevate their position.

A few quotations from his speech will show how fully he grasped the subject.

Looking at each Colony as possessed of some advantages, some resources peculiar to itself, it seems a conclusion almost inevitable and self-evident that combination must increase their effectiveness, and that the whole, developed and directed by one governing power, representing all the Colonies, must produce a result greater than the aggregated product under the separate unassisted agency of each separate Colony. . . . A wider field would give greater scope to the aspiring, and larger, and perhaps more generous, influences would be required for success. Party action, operating in an extended circle, would become less personal in its nature, and be consequently mitigated in its acrimony, and less powerful in suppressing a wholesome public opinion. . . . Thus, in the concentrated strength and energy and progress of these Colonies in an enlarged and more wholesome public opinion, a wider range for talent and

for the aspirations of ambition, might be found a remedy for the evils that seem inseparable from the condition of colonization at present, as also a theatre of action for British subjects worthy of British energy and suited to British feelings.

Mr. Johnson's Resolution was seconded by Mr. Joseph Howe, who said:

I agree with Mr. Johnson that there would be great advantages arising from a Union of these Colonies. . . . I believe that the day is not far distant when our sons, standing in our places, trained in the enjoyment of public liberty by those who have gone before them, and compelled to be statesmen by the throbbing of their British blood and the necessities of their position, would be heard across the Atlantic, and will utter to each other and to all the world sentiments which to-day may fall with an air of novelty upon your ears. I am not sure that even out of this discussion may not arise a spirit of union and elevation of thought that may lead North America to cast aside her colonial habiliments, to put on national aspects, to assert national claims, and prepare to assume national obligations. Come what may, I do not hesitate to express my hope that from this day she will aspire to consolidation as an integral portion of the realm of England, and assert her claims to a national existence.

Needless to say, the Resolution so ably sustained by two of Nova Scotia's most distinguished sons was cordially accepted by the Assembly.

I now come to the Legislative Assembly of

Canada, where the subject of Confederation was for the first time considered on a Resolution moved by Sir A. T. Galt and seconded by Mr. Pope. I quote the third paragraph of the Resolution as being all that is necessary for my purpose.

> That a General Confederation of the Provinces of New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island, with Canada and the Western Provinces, is most desirable, and calculated to promote their several and united interests by preserving to each Province the uncontrolled management of its peculiar institutions and its internal affairs, concerning which differences of opinion might arise with other Members of the Confederation, while it would increase that identity of feeling which pervades the possessions of the British Crown in North America, and by the adoption of a uniform policy for the development of the vast and varied resources of this immense territory will greatly add to the national power and consideration; and that a Special Committee be appointed to report on the steps to be taken for ascertaining without delay the sentiment of the inhabitants of the Lower Provinces and of the Imperial Government on this most important subject.[1]

To carry out the object of this Resolution, Messrs. Galt, Cartier and Ross were deputed to confer with the Colonial Secretary. There appears to be no report of this Conference, and so we are unable to say how the Canadian

[1] See *Journals Legislative Assembly*, 1858, p. 815.

Delegates were received. No doubt Mr. Galt intended, if his reception at the Colonial Office was satisfactory, to place his views fully before the Governments of the different Provinces directly.

Returning to Nova Scotia, we find evidence of progress. On the 15th of April, 1861, the Hon. Joseph Howe, in the Legislative Assembly, moved the following Motion:

Whereas, The subject of a union of the North American Provinces, or of the maritime provinces of British America, has been from time to time mooted and discussed in all the Colonies.

And Whereas, While many advantages may be secured by such a union, either of all these provinces or of a portion of them, many and serious obstacles are presented, which can only be overcome by mutual consultation of the leading men of the Colonies, and by free communication with the Imperial Government.

Therefore Resolved, That his Excellency the Lieutenant-Governor be respectfully requested to put himself in communication with his Grace the Colonial Secretary, and His Excellency the Governor-General, and the Lieutenant-Governors of the other North American provinces, in order to ascertain the policy of her Majesty's Government, and the opinions of the other colonies, with a view to an enlightened consideration of a question involving the highest interests, and upon which the public mind in all the provinces ought to be set at rest.

Which resolution being seconded and put, was agreed to by the House.[1]

[1] See *Nova Scotia Journals*, 1861, p. 128.

This Resolution was transmitted by the Lieutenant-Governor to the Duke of Newcastle, who, in his reply, dated "Downing Street, 6th July, 1862," said:

> I should see no objection to any consultation on the subject, and among the leading Members of the Governments concerned, but whatever the result of such a consultation may be, the most satisfactory mode of testing the opinion of the people of British North America would probably be by means of a Resolution or Address, proposed in the Legislature of each Province by its own Government. . . . If a Union, either partial or complete, should hereafter be proposed, with the concurrence of all the Provinces to be united, I am sure that the matter would be weighed in this country, both by the public, by Parliament and by Her Majesty, and that with no other feelings than an anxiety to discern and to promote any course which might be conducive to the prosperity, the strength and the harmony of all the British Communities in North America.

Thereafter the question slumbered until the 29th of March, 1864, when it was revived on a Motion by Sir Charles Tupper, as follows:

> Resolved that a humble Address be presented to His Excellency the Administrator of the Government, requesting him to appoint Delegates, not to exceed five, to confer with the Delegates who may be appointed by the Governments of New Brunswick and Prince Edward Island, for the purpose of considering the subject of the Union of the three Provinces under one Government and Legislature; such a Union to take effect when confirmed

by the Legislative Enactments of the various Provinces interested, and approved by Her Majesty the Queen.

The Administrator for the Province communicated this Resolution to the Lieutenant-Governors for New Brunswick and Prince Edward Island, and on their concurrence, it was arranged that a meeting of Delegates should be held at Charlottetown, in Prince Edward Island, on the 1st of September of the same year (1864).

The political agitation which prevailed in the two Western Provinces (Upper and Lower Canada) on Separate Schools and Representation by Population led to the rise and fall of five Ministries in two years, and became so embarrassing to both Parties that to overcome what was called a "deadlock," the two Parties entered into a coalition

for the purpose of removing existing difficulties by introducing the Federal principle into Canada, coupled with such conditions as would permit the Maritime Provinces and the North Western Territory to be incorporated into the same system; and the Government will seek, by sending Representatives to the Lower Provinces and to England, to secure the assent of those interests which are beyond the control of our own Legislation to such a measure as may enable all British North America to unite under a General Legislature based upon the Federal principle.

This agreement was arrived at in June, 1864.

Becoming aware of the meeting to be held at Charlottetown, the Government of Canada asked permission to send a Deputation to confer with the Delegates of the Maritime Provinces, in order to ascertain their views as to the inclusion of Upper and Lower Canada in the Union they were about to consider. The Deputation consisted of the Hon. John Macdonald, Hon. George Brown, Hon. George E. Cartier, Hon. Alexander T. Galt, Hon. D'Arcy McGee, Hon. Hector Langevin, Hon. William McDougall and Hon. Alexander Campbell. The conditions of the larger Union were submitted to the Convention by Messrs. Macdonald, Brown, Cartier and Galt. So deeply was the Conference impressed with the question of a larger Union, as presented by the Delegates from Canada, that it immediately adjourned to meet at the city of Quebec on an early date to be named by the Governor-General of Canada. On the return of the Deputation representing the Government of Canada, an Order in Council was passed advising His Excellency the Governor-General

That the several Governments of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland be invited to appoint Delegates under the authority of

the despatch of the Secretary for the Colonies to the Lieutenant-Governor of Nova Scotia, dated the 6th of July, 1862, to confer with the Canadian Government on the subject of a Union or Federation of the British North American Provinces, and that Quebec be selected as the place and the 10th of October next as the time for the Meeting.

Acting under this Order in Council, His Excellency, Lord Monk, under the date of the 23rd September, 1864, requested a Conference of Delegates from the Maritime Provinces, to meet the Ministers of Canada and consider the question of a Union of the British North American Colonies. On this invitation the Delegates[1] from all the British Colonies, to the number of thirty-three, assembled in the city of Quebec, and organized the Conference by appointing Sir E. P. Taché as Chairman and H. Bernard, of Ottawa, as Secretary. The Conference continued in Session from the 10th to the 28th of October, and adopted in all

[1] Canada (meaning the Provinces of Ontario and Quebec) was represented by Sir E. P. Taché, Sir John Macdonald, Sir George Cartier, Sir George Brown, Sir A. T. Galt, Sir Alexander Campbell, Sir Oliver Mowat, Sir Hector Langevin; and Messrs. Chapis, McGee (D'Arcy), McDougall (Hon. William) and Cockburn (afterwards Speaker of the House of Commons). Nova Scotia was represented by Sir Charles Tupper, Messrs. Henry (afterwards Judge of the Supreme Court), McCully (Archibald, afterwards Governor of Manitoba) and Dickie. New Brunswick by Sir Leonard Tilley and Messrs. Mitchell, Fisher, Steeves, Gray, Chandler and Johnson. Prince Edward Island by Messrs. Gray, Coles, Havilland, Palmer, Macdonald, Whalen and Pope. Newfoundland by Messrs. Shea and Carter.

seventy-two Resolutions, the last being "that the Proceedings of the Conference shall be authenticated by the signatures of the Delegates, and submitted by each Delegation to its own Government, and the Chairman is authorized to submit a copy to the Governor-General for transmission to the Secretary of State for the Colonies."

The Resolutions were accordingly transmitted by His Excellency the Governor-General, Lord Monk, to the Colonial Secretary, the Right Honorable Mr. Cardwell, who, in a despatch of considerable length, expressed his cordial approval of the action taken by the Delegates at the Conference at Quebec. In closing his despatch he made the following suggestions:—

1. It appears to Her Majesty's advisers therefore that you should now take immediate measures in concert with the Lieutenant-Governors of the several Provinces in submitting to the respective Legislatures this project of the Conference, and if as I hope you are able to report that these Legislatures approve and adopt the scheme, Her Majesty's Government will render you all the assistance in their power for carrying it into effect.

2. It will probably be found to be the most convenient course that, in concert with the Lieutenant-Governors, you select a deputation of the persons best qualified to proceed to this country, that they may be present during the consideration of the Bill, and give to Her Majesty's Government the benefit of their counsel upon

any questions which may arise during the passage of the measure through the two Houses of Parliament.

The Parliament of Canada, as suggested by the Colonial Secretary, was called for the 19th of January, 1865, to consider the Resolutions adopted at the Quebec Conference. On the 20th of February they were approved by the Legislative Council on a vote of 45 to 15, and in the Legislative Assembly on a vote of 91 to 33. Still acting on the second suggestion of the Colonial Secretary, the Government appointed Delegates to confer with Her Majesty's Government with reference to the draft of a Bill for the consideration of the Imperial Parliament in conformity with the object of the Quebec Conference.

In the Maritime Provinces the progress of the Union movement was delayed for some time by the fear that they would be so completely overshadowed by the western Provinces in the proposed Confederation as practically to destroy their identity. Besides, they did not consider the financial basis of the Quebec Resolutions satisfactory. Accordingly, Prince Edward Island and Newfoundland refused positively to enter the Union. New Brunswick also rejected the terms at first, but on reconsideration accepted them. After some delay,

however, and much effort on the part of the Union leaders, both Nova Scotia and New Brunswick agreed to send Delegates to London to confer with the Colonial Secretary and the Delegates from the western Provinces on the whole question of Confederation.

The Delegates met in London on the 4th of December, and on the 24th they reported to the Colonial Secretary the result of their labors. On the 12th of February, 1867, Lord Carnarvon introduced the Bill, as agreed upon by the Delegates, into the House of Lords, where it passed without amendment. On the 28th of February, Mr. Adderley, Under Secretary of State, submitted the Bill, as it came from the House of Lords, to the House of Commons, and on the 29th of March it received Her Majesty's Assent. On the 22nd of May following, Her Majesty issued a Royal Proclamation to bring it into effect as follows:—

Whereas by an Act of Parliament, passed on the twenty-ninth day of March, one thousand eight hundred and sixty-seven, in the thirtieth year of Our reign, intituled, "an Act for the Union of Canada, Nova Scotia and New Brunswick, and the Government thereof, and for purposes therewith" after divers recitals, it is enacted that: "It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honorable Privy Council, to declare, by Proclamation, that on and after a day therein appointed, not being more than six months after

the passing of this Act, the Provinces of Canada, Nova Scotia and New Brunswick shall form and be one Dominion under the name of Canada, and on and after that day these three Provinces shall form and be one Dominion under that name accordingly: And it is thereby further enacted 'That such persons shall be first summoned to the Senate as the Queen by warrant, under Her Majesty's Royal Sign Manual, thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union.'" We therefore do and with the advice of our Privy Council have thought fit to issue this Our Royal Proclamation, and we do ordain, declare and command that on and after the 1st day of July, 1867, the Provinces of Canada, Nova Scotia and New Brunswick shall form and be one Dominion under the name of Canada: And we do further ordain and declare that the persons whose names are herein inserted and set forth are the persons to whom we have by warrant, under Our Royal Sign Manual, thought fit to approve as persons who shall be first summoned to the Senate of Canada.[1]

[1] For list of Senators contained in Her Majesty's Proclamation see Appendix.

CHAPTER II

IS THE BRITISH NORTH AMERICA ACT A TREATY?

THE previous chapter closed with the Queen's Proclamation, by which the British North America Act was brought into effect on the 1st of July, 1867. The Act embodied, with a few alterations, the conclusions of the Quebec Conference. It was constituted by the surrender of a part of the sovereignty of the Provinces, by which it was accepted, to a Central Government, to be known as the Parliament of Canada. As stated by the Hon. David Mills, afterwards Minister of Justice and a Member of the Supreme Court, in the House of Commons in 1875:

> It was the union of several independent and distinct sovereignties for certain definite purposes, which divested themselves of the original power of which they were possessed, just in so far as these powers have been conferred upon a single or National Legislature.

The Central Government thus constituted became the custodian and trustee of all the powers surrendered by the Provinces. The question now to be considered is: Was this

surrender a treaty with the Parliament of Canada, as the trustee for the Provinces whose surrendered powers it was authorized to exercise?

In considering the proceedings of the Quebec Conference, where this trusteeship was originally agreed upon, I propose confining myself to the status of the Senate (styled the Legislative Council) as defined by the Quebec Resolutions under that treaty. Unfortunately, the records of the Conference in regard to these proceedings generally are very meagre; but from a volume entitled *Confederation Documents*, published by Sir Joseph Pope, we have a few details in regard to the organization of the Senate.

The first Resolution, after the Conference had decided as to the form of procedure, appears to have been moved by Sir John Macdonald and seconded by Sir Leonard Tilley. It was as follows:—

> That the best interests and present and future prosperity of British North America will be promoted by a Federal Union under the Crown of Great Britain, provided such union can be effected on principles just to the several Provinces.

The second Resolution was moved by the Hon. George Brown and seconded by Mr. Archibald, and is as follows:—

That in the Federation of the British North American Provinces the system of Government best adapted under existing conditions to protect the diversified interests of the several Provinces, and secure efficiency, harmony and permanency in the working of the Union, would be a General Government charged with matters of common interest to the whole country, and local Governments for each of the Canadas and for the Maritime Provinces charged with the control of local matters in their respective sections, provision being made for the admission into the Union on equitable terms of the North Western Territory, British Columbia and Vancouver.

Having settled the question of Confederation, Sir John Macdonald then moved:

That there should be a general Legislature for the Federated Provinces, composed of a Legislative Council and a Legislative Assembly.

This was carried unanimously. In that Resolution the Senate of Canada had its origin. It was then moved by Sir John Macdonald, seconded by Sir Oliver Mowat:

That for the purpose of forming the Legislative Council the Federated Provinces shall be considered as consisting of three divisions: (1) Upper Canada, (2) Lower Canada, (3) the Four Maritime Provinces; and each Division shall be represented by an equal number of Members.

In this second Resolution the representative character of the Legislative Council, or Senate,

is set forth. It was then moved by Sir John Macdonald:

> That the Members of the Legislative Council shall be appointed by the Crown, under the great Seal of the General Government, and shall hold office during life.

This Resolution declares the choice of the Conference to be a nominative Legislative Council under a life tenure of appointment. Subsequent Resolutions declared that the Members of the Legislative Council should be British subjects, of the full age of thirty years, and should possess a real property qualification; that they should, in the first instance, be selected from the Legislative Councils of the various Provinces, with the exception of Prince Edward Island, so far as a sufficient number could be found qualified and willing to serve, and that the appointment by the Crown should be limited to the nomination of Legislative Councillors by their respective Local Governments. The Proceedings of the Conference contain no further information with regard to the discussions on the formation of the Legislative Council. All we know is that the Conference unanimously agreed upon the following Resolutions as to the extent to which they had surrendered their power to the Central Government which they had created.

6. There shall be a General Legislature or Parliament for the Federated Provinces, composed of a Legislative Council and a House of Commons.

7. For the purpose of forming the Legislative Council the Federated Provinces shall be considered as composed of three Divisions: (1) Upper Canada, (2) Lower Canada, (3) Nova Scotia, New Brunswick, and Prince Edward Island; each Division with an equal representation in the Legislative Council.

8. Upper Canada shall be represented in the Legislative Council by 24 Members, Lower Canada by 24 Members, and the three Maritime Provinces by 24 Members, of which Nova Scotia shall have 10, New Brunswick 10 and Prince Edward Island 4 Members.

9. The Colony of Newfoundland shall be entitled to enter the proposed Union with a representation in the Legislative Council of 4 Members.

10. The North Western Territory, British Columbia and Vancouver, shall be admitted into the Union on such terms and conditions as the Parliament of the Federated Provinces shall deem equitable, and as shall receive the assent of Her Majesty, and in the case of the Province of British Columbia or Vancouver, as shall be agreed to by the Legislatures of such Provinces.

11. The Members of the Legislative Council shall be appointed by the Crown under the Great Seal of the General Government, and shall hold office during life. But that if any Legislative Councillor shall, for two consecutive Sessions of Parliament, fail to give his attendance in the State Council, his seat shall thereby become vacant.

12. The Members of the Legislative Council shall be British subjects by birth or naturalization, of the full age of thirty years, shall possess a continuous real property

qualification of four thousand dollars ($4,000.00), over and above all encumbrances, and shall be worth that sum, over and above their debts and liabilities, and in the case of Newfoundland or Prince Edward Island the property may be either real or personal.

13. If any question shall arise as to the qualifications of a Legislative Councillor, the same shall be determined by the Council.

14. The first election of the Members of the Legislative Council shall be made, except as regards Prince Edward Island, from the Legislative Councillors of the various Provinces, so long as a sufficient number be found qualified and willing to serve. Such Members shall be appointed by the Crown at the recommendation of the General Executive Government, upon the nomination of their respective Local Governments, and in such nomination due regard shall be had to the claims of the Members of the Legislative Council of the Opposition in each Province, so that all Political Parties may as nearly as possible be equally represented.

15. The Speaker of the Legislative Council (unless otherwise provided by Parliament) shall be appointed by the Crown from among the Members of the Legislative Council, and shall hold office during pleasure, and shall only be entitled to a casting vote on an equality of votes.

16. Each of the 24 Legislative Councillors representing Lower Canada on the Legislative Council of the General Legislature, shall be appointed to represent one of the 24 Electoral Divisions mentioned in Schedule (a) of Chapter I of the Consolidated Statutes of Canada, and each Councillor shall reside or possess his qualification in the Division he is appointed to represent.

The Conference adjourned on the 28th of October, having agreed to a treaty consisting of seventy-two Resolutions, to which all parties affixed their signatures and forthwith placed the same in the hands of the Governor-General as the unanimous findings of the Conference.

The next stage to be taken was the confirmation of the Quebec Resolutions by the Legislatures of the respective Provinces. For this purpose the Parliament of Canada met on the 19th of January, 1865. In his speech at the opening of Parliament the Governor-General said:

> This Conference [the Quebec Conference], by lengthy deliberations, arrived at the conclusion that a Federal Union of the British North American Provinces was feasible and desirable, and the result of their labor is a completion of such proposed union, embodied in a series of Resolutions, which, with other papers relating to the subject, I have directed to be laid before you.

After the usual proceedings attending the opening of Parliament were concluded, Sir E. P. Taché, on the 3rd of February, moved the following Motion in the Legislative Council:

> That a humble Address be presented to Her Majesty, praying that she may be graciously pleased to cause a measure to be submitted to the Imperial Parliament for the purpose of uniting the Colonies of Canada, Nova Scotia, New Brunswick and Prince Edward Island and

Newfoundland under one Government, with provisions based on the Resolutions which were adopted at the Conference of Delegates from the said Colonies in the city of Quebec on the 10th of October, 1864.

The Resolutions were discussed in the Legislative Council for several weeks, and were received with general favor. The Hon. Mr. Sanborn, however, objected to Resolution 11, and moved an Amendment, on the 9th of February, to the effect—

That the Legislative Council, so far as Upper and Lower Canada are concerned, should be elective, and that the representation of the Maritime Provinces should be for life, and reduced from 24 to 10.

Speaking to this Amendment, Sir E. P. Taché said:

Gentlemen from the Lower Provinces were opposed to the elective principle, and went strongly for the principle of appointment by the Crown. At the same time some among ourselves are not so enamored of the present system, and those who were anxious to retain the elective system were obliged to yield to this Resolution which now comes before you, not as an act of the Government of Canada, but as the mixed work of the Delegates from all the Provinces in the form, as it were, of a treaty.

After a debate, Mr. Sanborn's Amendment was rejected, on a vote of 36 to 19, thus sustaining Sir E. P. Taché's declaration that the

Resolutions before them were to be regarded as an agreement between the Provinces, or, in other words, as a treaty which the Legislative Council could not alter without defeating the purpose of the Conference.

In submitting to the Legislative Assembly the discussion of the Quebec Resolutions, Sir John Macdonald was asked by Mr. Powell, the Member for Carleton County, whether the House was expected to adopt the scheme in its entirety, or was it open to the House to adopt one portion of it and reject another portion of it. In answer to this question, Sir John Macdonald said:

> The Government desired to say that they presented the scheme as a whole, and would exert all the influence they could bring to bear in the way of argument to induce the House to adopt the scheme without alteration; and for the simple reason that the scheme was one framed not by the Government of Canada or the Government of Nova Scotia, but it was in the nature of a treaty settled between different Colonies, each Clause of which had been fully discussed, and which had been agreed to by a system of mutual compromise.

And in reply to a similar question, by the Hon. A. A. Dorian, Sir John Macdonald said:

> These Resolutions were in the nature of a treaty, and if not adopted in their entirety the proceedings would have to be commenced *de novo*. If each Province

undertook to change the details of the scheme there would be no end to the discussions and the conferences which would have to be held. . . . So that Confederation might not be effected until the Day of Judgment.

The Hon. William McDougall reiterated the answer of Sir John Macdonald later in the Debate, and said:

It is fully understood by the House that the scheme was brought before Parliament as the result of a Conference of all the Colonial Governments, and as a Government measure, and that, being in the nature of a treaty, it was absurd to suppose that it would be competent for any of the Legislatures to amend the scheme, because the moment it was first thrown open to amendment in one Legislature, the same privilege would be claimed by each of the others. . . . In the very nature of things—whether this is the best or the worst scheme that could have been devised—we cannot get around the fact that it is of the nature of a treaty, and therefore must be voted upon by a simple Yea and Nay.

D'Arcy McGee said:

We are assembled under the authority of an Imperial despatch to Lord Mulgrave, Governor of Nova Scotia, and acting under the sanction it gives. Everything we did was done in form and with propriety, and the result of our proceedings is the document that has been submitted to the Imperial Government, as well as to this House, and which we speak of here as a treaty. And that there may be no doubt as to our position in regard to that document, you may question it; you may reject

it, you may accept it, but alter it you may not. It is beyond your power or our power to alter it. . . . On this point I repeat, with all my Honorable friends who have already spoken for one Party, to alter a treaty is, of course, to destroy it. . . . Even if we were to make alterations in it, we are not bound to accept them. . . . These details are now before you. It is not in your power to alter any of them, even if the House desires it. If the House desires it, it can reject the treaty, but we cannot, nor can the other Provinces which took part in this negotiation, consent that it should be altered in the slightest particular. . . . We can go to the Imperial Government, the common arbiter of all of us, in our true Federal Metropolis. We go to ask for our fundamental Charter. We hope by having that Charter, which can only be amended by the authority that made it, that we will lay the basis of permanency for our future Government.

In the Assembly the debate took a very wide range, and was conducted in good temper and with great ability. In order to focus the judgment of the House on the Quebec Resolutions as a treaty which might be rejected, but which could not be amended, Sir John Macdonald moved what in parliamentary language is called the "previous question," which means that, although the debate may continue, no Amendments to the question before the House can be offered. This was agreed to by a vote of 85 to 39, and on the 14th of March the House adopted Sir John Macdonald's Motion to

present an Address to His Excellency, in terms similar to the Address moved in the Legislative Council, asking for Imperial legislation on the basis of the Quebec Resolutions, by a vote of 91 to 33.

Turning to the Provinces of Nova Scotia and New Brunswick, we find that owing to the agitation against some of the terms contained in the Quebec Resolutions, the leaders of the Federation movement did not consider it expedient to submit them to their respective Legislatures for ratification, but, instead, obtained consent to go to London to negotiate direct with the Colonial Office. The Resolution adopted by the Nova Scotia Legislature on the 17th of April, 1866, was as follows:—

> Whereas in the opinion of this House it is desirable that a Confederation of the British North American Provinces should take place; Resolved therefore that His Excellency the Lieutenant-Governor be authorized to appoint Delegates to arrange with the Imperial Government a scheme of union which will effectually ensure just provision for the rights and interests of this Province; each Province to have an equal voice in the said Delegation, Upper and Lower Canada being for this purpose considered as separate Provinces.

The Resolution adopted by the Assembly of New Brunswick on the 30th of June, 1866, was as follows:—

Resolved that a humble Address be presented to His Excellency the Lieutenant-Governor, praying that His Excellency would be pleased to appoint Delegates to unite with Delegates from the other Provinces in arranging with the Imperial Government for the Union of British North America upon such terms as will secure the just rights and interests of New Brunswick, accompanied with provisions for the immediate construction of the Intercolonial Railway; each Province to have an equal voice in such Delegation, Upper and Lower Canada to be considered as separate Provinces.

These Resolutions were afterwards submitted by Sir Charles Tupper and Sir Leonard Tilley to the Delegates from Canada that met in London, as requested by the Colonial Secretary, to assist in framing a Bill for the consideration of the Imperial Parliament, as their credentials for taking part in the Conference. Moreover, although the Maritime Provinces had not accepted the Quebec Resolutions *pro forma*, the Delegates in London accepted them as the basis for a Federal Union of all the Provinces of Canada. This is clear from the report contained in Pope's *Confederation Documents*[1] and from remarks made by the Delegates as follows:

Mr. McCully, of Nova Scotia:

We have adopted the Quebec scheme as a backbone, but I think we are here to bring our judgment and

[1]See Pope's *Confederation Documents.*

maturer reflections to bear upon it. We are tied down to nothing, but should not depart unnecessarily from the Quebec scheme.

Mr. Fisher, from New Brunswick:

I have heard forty objections in New Brunswick to the scheme [Quebec Resolutions], but shall act on my own judgment. This matter will be settled on the basis of the Quebec scheme.

Mr. Johnson, of New Brunswick:

The Quebec scheme should be the basis, but we may agree upon some alterations, and these may necessitate other changes.

Mr. Mitchell, from New Brunswick:

As regards New Brunswick, I look upon our position here as not to open and discuss the Resolutions, but as to certain specific objections to the scheme [Quebec Resolutions].

Mr. Galt, from Canada:

I look upon myself as bound by the Quebec scheme, as asserted on two occasions in Canada. The real points on which we might vary the Resolutions are those which were notoriously objected to in the Maritime Provinces, but in the matter of detail I think we should not depart from Quebec.

Mr. Howland, from Canada:

We place ourselves in a false position in every departure from the Quebec scheme, but in advocating an alteration

in the questions objected to by the Colonial Office [limit of prerogative] I thought we had full power.

Mr. Macdonald, the Chairman:

The Maritime Delegates are differently situated from us. Our Legislature passed an Address to the Queen, praying for an Act of Union on the basis of the Quebec Resolutions. We replied to inquiries in our last Session of Parliament that we did not feel at liberty ourselves to vary those Resolutions. It is quite understood in Canada, though never reduced to writing, that if any serious objection should be made by the Maritime Provinces we should be prepared to listen and consider.

And now we come to the last stage through which the treaty had to pass in order to bind all parties concerned. On the 12th of February, Lord Carnarvon introduced the Bill, to which the Delegates of Canada had agreed, into the House of Lords. In discussing the Bill on the second reading, His Lordship said:

The Quebec Resolutions, with some slight changes, form the basis of a measure that I have now the honor to submit to Parliament. To those Resolutions all the British Provinces in North America were, as I have said, consenting parties, and the measure founded upon them must be accepted as a treaty of union.

On a visit to Canada in 1883, at a banquet given in his honor, at Montreal, on September 19th, referring to his connection with the

passing of the British North America Act in the House of Lords, he said:

I venture to reply to your statement, and I believe it would be the opinion of the highest tribunals that your Federation Act is not to be construed merely as a municipal Act. It is to be viewed as a treaty, and I will say for the great mass and body of the people that no Legislative or Constitutional machinery can be maintained in its efficiency unless there be sobriety of judgment and plain common sense on their part.

When the Bill passed into the House of Commons, it was taken up by Mr. Adderley, Under Secretary of State, who, in the course of his speech on the second reading of the Bill, said:

The House may ask what occasion there can be for our interfering in a question of this description. It will, however, I think, be manifest, upon reflection, that, as the arrangement is a matter of mutual concession on the part of the Provinces, there must be some external authority to give a sanction to the compact into which they have entered. It is very true we have often given to colonies, secondary in importance to these, the task of framing their own Constitution. A general Act was passed two years ago which gives to all colonies with representative institutions the power, at any time, of altering their Constitution within certain limits; but it is clear the process of federation is impracticable to the constituent Legislatures. If, again, federation has in this case specially been a matter of most delicate treaty and compact between the Provinces—if it has been a

matter of mutual concession and compromise—it is clearly necessary that there should be a third party *ab extra* to give sanction to the treaty made between them. Such seems to me the office we have to perform in regard to this Bill.

In tracing the history and parliamentary evolution of the British North America Act, from its first outline in the Quebec Resolutions to its Proclamation by Her Majesty, it is quite evident that in every stage of its progress it was regarded by its framers as a treaty under which the Provinces agreed to transfer a certain portion of their sovereignty to a central Government, which would undertake to discharge the duties common to all, while at the same time leaving the residuum of their sovereignty intact and unimpaired. This Central Power is defined in the British North America Act as a Parliament composed of two trustees, the Senate and the House of Commons. These trustees are invested with co-ordinate powers. Except as to methods of doing business, they act together. Nothing can be concluded with regard to the powers conferred upon them by the treaty without the advice and consent of both, nor without the assent of His Majesty, the supreme trustee for the nation.

Now, is it not clear that a trusteeship so formed cannot be dissolved, or its powers

abridged or increased, without the consent of the parties by whom it was made? Is it not equally clear that the treaty does not confer the power upon either trustee to dismiss or ignore his colleague, no matter how disagreeable his official relations with him may be? As they are not in any sense responsible the one to the other, the trustee representing the House of Commons cannot abolish the office of his co-trustee—that is, the Senate—and *vice versa*. Neither can he change the conditions under which his co-trustee holds his office, or the mode by which he is appointed.

But it may be said that if one trustee becomes obnoxious to the other, or obstructs him in the discharge of the duties assigned to him under the treaty, has he no redress? Certainly. If the Provinces at any time consider the treaty as destructive or subversive of their interests, they are at liberty to appeal to His Majesty, by whom it was ratified, for its amendment, either by the abolition of the joint trusteeship, or by a change in the mode of appointing either or both trustees. Or if one or both trustees find themselves unable to perform the duties assigned to them according to the terms and tenor of the treaty, they might appeal to the Provinces, from which they originally derived their authority, for a reconsideration of the conditions of their appointment.

As these conditions were in the first instance prescribed by the Provinces, so only by the Provinces could the Trustees be relieved from their obligations under the treaty. If the Provinces should say: "We will nominate the trustees ourselves"; or if they should say: "We shall elect them by popular vote," and if such a change is ratified by His Majesty, thus, and thus only, can the original conditions of the treaty be changed.

The necessity for a prior assent of the Provinces to any constitutional change in the British North America Act was very strongly emphasized by Mr. Palmer, a Member from Nova Scotia, in the debate in the House of Commons on the Motion proposed by Mr. Mills in 1875 for a Committee of the Whole House to consider a change in the mode of appointment of Senators. Mr. Palmer said:

> Would the Honorable Member for Bothwell contend in this House that the Imperial Parliament would have a Constitutional right to pass the British North America Act at all without the consent of the various Provinces interested therein? [He, Mr. Palmer, insisted] they would not, and having passed that Act with the consent of the Provinces, could it be altered by the Imperial Parliament without the same consent? It would not only be a violation of the Constitution, but also of the distinctive agreement between the Provinces. If the Honorable gentleman admitted these two propositions,

he would have to admit that his proposition for a change in the Constitution of the Senate involved the commission of an unconstitutional act by this House. If our Constitution could be altered on one point, none of its propositions would be safe. [He, Mr. Palmer] had not the slightest objection to this or any other question being brought forward, provided it were done in the proper way, and the proper way in this case was to have a joint Convention of the Provinces, afterwards initiating any measure on the subject in the Local Legislatures, and afterwards passing it through the Dominion Parliament. Then, and not till then, would the British Government be likely to accede to an alteration in our Constitution.

In the same debate Mr. Thomas Moss, afterwards a Justice of the High Court of Ontario, said:

One object which the framers of the constitution had in view was, as they had been told on high authority and learned from the Confederation debates, that the Senate should be a sort of buttress against encroachment by the larger Provinces on the rights of the smaller Provinces. He believed its retention was to be justified on principles of high Policy; but, at all events, it was sufficient for the present purpose to say that the compact had been entered into by which the smaller Provinces were to enjoy representation in a body distinct from the popular body, and that compact must be observed.

So far I have been discussing the relation which the three Provinces which first entered Confederation bore to the central Government.

The rights of the other Provinces, namely, British Columbia and Prince Edward Island, which were practically autonomous when they entered the Union, are somewhat different. By Section 146 of the British North America Act, it was provided that on an Address from the Legislature of either Province to the Dominion Government, both Provinces should be admitted to Confederation on terms and conditions to be agreed upon. These terms and conditions were subject to the approval of the Parliament of Canada, then to the approval of Her Majesty in Council, and when such approval was proclaimed in the usual manner, both Provinces became federally united on the terms and conditions contained in the Royal Proclamation. If it were proposed to amend the Act, for the union of these Provinces, the mode of procedure should evidently be identical with that adopted on their admission to Confederation; that is to say, the consent of their Legislatures, the Senate and the House of Commons, and His Majesty in Council. Although they were not parties to the original treaty, which led to the British North America Act, each made a treaty for itself with the Dominion Government, subject to the approval of Her Majesty in Council, and no privilege or right conferred by that treaty can be withdrawn except by a similar procedure.

There still remain the constitutional rights of the Provinces formed out of the North-West Territory. As the Parliament of Canada had full authority from the Imperial Government to establish the three Provinces, and to give them such a Constitution as, in its opinion, would best subserve their interests, it is always open to the Dominion Parliament to amend that Constitution as might be deemed expedient. It was granted without any bargain, contract or treaty with the Legislatures it had created, and no authority was given to intervene in the case of proposed amendments. Having been formed subsequently to the admission of the other Provinces into Confederation, they can have no voice in the amendment of the British North America Act, except such as can be expressed either in the Senate or in the House of Commons, and they have no right of appeal from any action of the Dominion Parliament regarding their Constitution, save and except such rights as the Dominion Parliament has conferred or may confer upon them.

CHAPTER III

CONSTITUTIONAL OBLIGATIONS OF THE SENATE

By Section 17 of the British North America Act it is declared "There shall be one Parliament for Canada, an Upper House styled the Senate and the House of Commons." There is no differentiation in the constitutional obligations of the Senate and the House of Commons. They constitute together one Parliament, and on the Statute Book they speak with one voice. It is not unreasonable, however, to expect that on questions of public policy they may occasionally differ, but there should be no discord where the law of the Constitution is concerned. I shall only mention two principles underlying the Constitution, on which the attitude of the Senate under all circumstances should be unimpeachable—the independence of Parliament and the sanctity of responsible government. No question of expediency or public policy should be entertained, no matter how plausible its claims may be, which would impair by one jot or tittle these fundamental principles.

It would take me too far afield to recapitulate the battles fought on behalf of responsible

government in the Motherland or in Canada in the heroic past. They were the battles of the people against Royal, Ecclesiastical and Hereditary prerogative; of "the masses against the classes"; of free speech against privileged censorship; of free government against jealous paternalism. Happily for Canada, she obtained in due season, from the Imperial Government, a title-deed as full and comprehensive as it was possible to give to that rich heritage of parliamentary government which it took the Mother Country six centuries to garner. And so the significance and sanctity attachable to the terms "independence of Parliament" and "responsible government" in the Motherland should have the same force and validity when applied to the Constitution of Canada. To preserve these principles in their integrity should be the first duty of the Senate.

Let me briefly consider the constitutional obligations of the Senate in three aspects: (1) as to the relations of Canada with the Imperial Government, (2) as to our relations with foreign countries, distinguishing in each case between questions of policy and questions of constitutional limitation, and (3) as to the relations of the Senate with the Provinces composing the Union.

The difference between the policy and the

sovereignty of the Constitution was very clearly brought out by Lord Lansdowne in an address delivered at Ottawa on the 15th of May, 1888, on the eve of his retirement from the Governor-Generalship of Canada. Referring to our relations with the Empire, he said:

> Let me say frankly that in my opinion public sentiment in the great possessions of the Crown would be exposed to a great strain if the self-governing Colonies were ever to be required to part with any material portion of the freedom which they now enjoy in the management of their own affairs. I have the honor of a very close acquaintance with a considerable number of your Legislators here, and I will venture to say that there is no feeling stronger in their minds, and in those of their Constituents, than the feeling that in purely constitutional affairs the Canadian recognizes the absolute supremacy of the Canadian Parliament. Now, I do not believe that public sentiment here would tolerate any change depriving it of that authority, or transferring any portion—let us say, to an Imperial Chamber sitting at Westminster. . . . Take for example a great question which is now engaging the attention of the public and Her Majesty's Government at home—I mean the question of Imperial Defence. There is, I think, room for a great improvement in the existing condition of things. There is no reason why the Governments of the great Colonies and the United Kingdom should not agree beforehand as to what measures are to be taken with the Military and Naval Forces at their disposal for the protection of large portions of our Imperial possessions. The part to be

taken by the British and Colonial forces respectively in manning the different positions might with great advantage be determined, and there are many other steps of the same sort which will readily suggest themselves to you, but if we are to go further than this, and have a covenant binding this country to place a certain proportion of men at the absolute disposal of the Imperial Government whenever it is called upon, I say frankly that I do not believe that such an arrangement would work. If the safety of the Empire was menaced, and if the people of this country felt that the cause was a just one, you would not choose that moment, when the Empire was in peril, to repudiate that relationship, or to avoid your share in resisting the attack. Under such circumstances I would sooner trust to the spontaneous action of Canada to give me fifty thousand men, than trust to getting a couple of regiments because you were under a hard and fast bargain, compelling you to supply them.

It will be observed that Lord Lansdowne was profoundly impressed with the duty of maintaining unimpaired all the rights of self-government conferred upon Canada by the Imperial Parliament. He points out the danger of requiring the self-governing Colonies to part with any material portion of their freedom in the management of their own affairs, or of transferring any portion to an Imperial Chamber sitting at Westminster. Had he desired to consider the relations of Canada with the Empire from a purely constitutional point of view, his

speech could not have been more suggestive. He declares that in purely constitutional affairs Canadians recognize the absolute supremacy of the Canadian Parliament. This supremacy extends over all matters mentioned in Section 91 of the British North America Act, and was an essential part of the treaty with the Provinces contained in the resolutions of the Quebec Conference. The powers possessed by the Parliament of Canada are not concurrent, that is, they are not shared in by the Provinces except as to agriculture and immigration. Moreover, the British North America Act does not empower the Parliament of Canada to transfer any of these powers to the Provinces, or even to an Imperial Chamber sitting at Westminster. In the management of the Postal Service, the Public Debt, Banking and Commerce, Customs Excise, Military and Naval Service and Defence, etc., absolute supremacy is vested in the Parliament of Canada. While it is under no constitutional disability to contribute money for any of the purposes over which it is vested with exclusive control, it has no power to attach conditions to such contributions as would affect its independence or impair its responsibility to the people. Constituted, as it was, by the Provinces as their trustee for the exercise of the powers contained in

Section 91, it can neither transfer its powers nor divide or repudiate them except with the consent of the Provinces from which they were derived.

When Parliament gave a preferential tariff for British imports, it required no corresponding favor in return from the Imperial Parliament. It preserved, in the words of Lord Lansdowne, the "absolute supremacy" of the Canadian Parliament. And so it could increase or diminish or repeal the preference so granted without being answerable for its action except to the people from whom it derives its authority under the Constitution.

But why should there be any conflict between the policy of Parliament and the independence of Parliament? The Constitution is broad enough to allow all the scope, as well as all the power, necessary for peace, order and good government that Great Britain possesses, except to declare war or make treaties with foreign countries. Within its compass Canada has already built up a great empire, has carried out gigantic schemes of transportation, founded Provinces greater in area than Germany or France, and has risen to the first rank among His Majesty's dominions beyond the seas. If so much has been accomplished within our constitutional limitations, what is to be gained

by disturbing these fundamental principles of government, which are the best security for the stability and continuity of the Constitution?

The complete responsibility of Ministers to Parliament was ably discussed in 1859 by Sir A. T. Galt, in reply to a remonstrance from the Colonial Secretary, the Duke of Newcastle, against the increase of duties proposed in the Tariff Bill of that year. Sir A. T. Galt said:

> The Provincial Ministry are at all times ready to afford explanations in regard to the legislation to which they are a party, but subject to their duty and allegiance to Her Majesty their responsibility in all questions of general policy must be to the Provincial Parliament, by whose confidence they administer the affairs of the country. . . . Self-government would be annihilated if the views of the Imperial Government were to be preferred to those of the people of Canada.

So far I have been dealing mainly with the functions of the Senate as the guardian of the independence of Parliament against encroachment from without. Its functions as the guardian of the rights of the Provinces composing the Federal Union are equally important.

By Section 22 of the British North America Act, Canada was divided into three divisions for representation in the Senate, each division to be represented by twenty-four Senators. In Ontario

and the Maritime Provinces the appointments were made for the Provinces at large. In Quebec senatorial appointments were made for each of the twenty-four Electoral Districts into which the Province was divided, with the condition that the Senators so appointed should either reside or possess the property qualification required by Statute within the district. This method of appointing Senators followed to a certain extent the mode of appointment in the United States Senate, where each State—no matter how small—was by the Constitution represented by two members. In the Commonwealth of Australia also each state was allotted a definite representation in the Senate. The reports of the Conference of Quebec throw no light on the reasons for this equality of representation, but when we turn to the Debates in the Legislature of Canada, when the Quebec Resolutions were under consideration, we find the reasons for this division pretty fully discussed. For instance, on the 6th of February, 1865, Sir John Macdonald, after referring to the Constitution of the Lower House and the adoption of the principle of representation based upon population, turned his attention to the Constitution of the Senate, and said:

> In order to protect local interests and to prevent sectional jealousies, it was found requisite that the three

great divisions into which British North America is separated should be represented in the Upper House on the principle of equality. There are three great Sections, having different interests, in this proposed Federation. We have Western Canada, an agricultural country, far away from the sea, and having the largest population, with agricultural interests principally to guard. We have Lower Canada, with other and separate interests, and especially with institutions and laws, which she jealously guards against her absorption by any larger, more numerous and stronger Power. And we have also the Maritime Provinces, having also each sectional interests of their own, having, owing to their position, classes and interests which we do not know in Western Canada. Accordingly, in the Upper House, the controlling and regulating, but not initiating, branch, we have the sober second thought in legislation, which is provided in order that each of these great Sections shall be represented equally by 24 Members. . . . To the Upper House is to be confided the protection of sectional interests, and therefore is it that the three great Divisions are there equally represented for the purpose of defending such interests against the combinations of majorities in the Assembly.

The Hon. George Brown, in the same Debate, said:

Our Lower Canada friends have agreed to give us representation by population in the Lower House on the condition that they shall have equality in the Upper House, and on no other condition could we have advanced a step, and for my part I am quite willing that they shall have it. In maintaining the existing sectional

boundaries, and handing over the control of local matters to local bodies, we recognize to a certain extent diversity of interests, and it was quite natural that a protection for these interests by equality in the Upper House should be demanded by the less numerous Provinces. . . . If from this concession to equality in the Upper Chamber they are restrained from forcing through measures which our friends of Lower Canada may consider injurious to their interests, we shall at any rate have power which we never had before to prevent them from forcing through whatever we may deem unjust to us. I think the compromise a fair one, and am persuaded that it will work easily and satisfactorily.

On the same day Sir Alexander Campbell, in presenting the reasons for framing the Constitution of the Upper House on the basis contained in the Resolutions, said:

The main reason was to give each of the Provinces adequate security for the protection of its local interests, that protection which it was feared would not be found in a Lower House, where the representation was based upon numbers only, as would be the case in the General Assembly. . . . It was determined that in one branch there would be a fixed number of Members nominated by the Crown, to enable it to act as a counterpoise to the branch in which the principle of representation according to population would be recognized.

On the 19th of May, 1877, the Constitution of the Senate was discussed at considerable length,

on a Motion by Sir Alexander Campbell protesting against the proposed increase of the Senate during the administration of Alexander Mackenzie, to bring it into harmony with the House of Commons. Sir Alexander Campbell said:

> At Quebec there were gathered Representatives from all the Provinces which united to form the Dominion, and at this Conference great fears were expressed that in the working of the Constitution small Provinces might find themselves overwhelmed by the numerical preponderance and strength of the larger ones, and to counterbalance the representation in regard to population, which was to obtain in the House of Commons, the Senate was constructed on the territorial principle, equal rights and numbers being given to three great sections of the Dominion without reference to their population. It will be remembered by those who were present at Quebec, amongst whom is my Honorable friend from Toronto [Hon. George Brown], the only Member of this House besides myself who was a Member of the Quebec Conference, that the Representatives of the smaller Provinces clung with great tenacity to the principle of having in the Senate a fixed number of Senators from each Division, and that the plan ultimately arrived at of allotting 24 Senators from Ontario, 24 from Quebec, and 24 from the Maritime Provinces, was one which the Members of the Quebec Conference believed to be vital, and insisted upon as a part of the scheme of Federation.

On the same day Senator Wilmot, of New Brunswick, said:

The Senate was put on territorial representation especially for the purpose, among others, of guarding the interests of the smaller Provinces, and to resist any encroachment on the part of the larger Provinces, which held so much larger representation in the House of Commons.

Senator Dickey said that, as he

had been referred to as a Member of the Quebec Conference, it would show that the account given by the Hon. Senator from Kingston [Sir Alexander Campbell] that the reason for fixing the number of Senators for the different Provinces was correct. The leading reason was the fear that the smaller Provinces would be swamped by the controlling power of the larger Provinces in future appointments. That was why they adhered so tenaciously to a fixed representation in the Senate.

Senator Miller, of Nova Scotia, said:

The Senate was constituted as a check on the larger Provinces, and a protection for the weaker ones.

The Constitution of the Senate was also discussed by the Conference of Delegates held in England, while revising the Quebec Resolutions, under the direction of the Colonial Secretary. In that discussion Sir A. T. Galt is reported to have said:

To the Legislative Council all the Provinces look for protection under the Federal principle.

Sir Charles Tupper:

In the Maritime Provinces we felt that the great preponderance of Canada could only be guarded against by equal representation in the Legislative Council. . . . This is not a Legislative Union, and we have sectional and local differences. Lower Canada and the Maritime Provinces require some guarantee.

Sir Leonard Tilley:

I agree with Sir Charles Tupper. Our protection is as now settled [by the Quebec Resolutions].

Sir William Howland:

I admit that if the Government is to be constituted upon the Federal principle the number should be fixed, and should represent localities.

Sir Adams Archibald:

This lies at the root of our whole scheme, the spirit of which is that each Province shall be sectionally represented in the Legislative Council.

Sir John Macdonald:

We are all agreed that each of the divisions should be equally represented, and should not be varied.

Mr. Wilmot:

I agree with Messrs. Tilley and Tupper as to the necessity of keeping sectional representatives.

Sir Hector Langevin:

Lower Canada insists that each of its present Divisions shall have representation in the Council.

It is quite evident, from the preceding quotations, that the Senate of Canada was intended to be in a special sense the guardian of Provincial rights. This is distinctly emphasized by the allotment of the Senators of Quebec to Electoral Districts, in order that Protestants and Catholics, French-Canadians and English-speaking subjects, might not feel themselves entirely without protection in one Chamber at least of the Federal Government. Moreover, so carefully has the territorial principle of representation been guarded that should any want of harmony occur between the two Houses, power was given to Her Majesty, acting, of course, through the Governor-General in Council, to appoint six additional Senators; but in so doing the number shall be equally divided between the three districts. The evident object of this distribution is to provide proportionate representation for the protection of local interests.[1]

The observations of the founders of Confederation on the constitutional obligations of

[1]A similar principle is applied to the representation in the Legislative Assembly of the Province of Quebec. By Section 80 of the British North America Act the boundaries of certain Electoral Districts (twelve in number) cannot be changed by the Assembly, except with the consent of a majority of the Members representing such districts.

the Senate as the protector of the territorial rights of the Provinces deserve more than a passing notice. If accepted as interpreting the Constitution (and by whom could a more reliable interpretation be given?), they invest the Senate with an obligation not generally understood; that is, its guardianship of the Constitution as a Treaty with the Provinces. By the Constitution of the United States, the Senate has the right to amend or reject any Treaty made by the Executive Government. It is, therefore, the guardian of the honor as well as of the interests of the Republic in its relations with foreign countries. In the same sense, and to the same degree, the Senate of Canada is constituted the guardian of every right "exclusively" conferred upon the Provinces under Section 92 of the British North America Act. No matter what may be the impulses or political exigencies of the Lower Chamber; no matter how clamorous one or more of the Provinces may be for special consideration, or for a modification of any of its conditions; no matter how urgent may be the appeal for better terms, the first and only duty of the Senate is to consider the Treaty rights of all the Provinces under the Constitution. The rights of one are the rights of all. To deprive one of what is its due, or to favor one beyond what is its due, is to do an injustice to all. Nor

should the Senate allow the Federal Government to be deprived of any of its power in the interests of the Provinces, or allow its resources to be taxed beyond what the Constitution has imposed upon it for Provincial purposes. To bestow favors upon the Provinces to which they are not entitled simply means a redistribution of the powers of the British North America Act, for which the Senate has no authority without the consent of the Imperial Parliament.[1]

[1]See Chapter VIII., *post*.

CHAPTER IV

LEGISLATIVE DUTIES OF THE SENATE

It has already been stated that, except as to Money and Revenue Bills, the duties of the Senate and the House of Commons are co-ordinate. Both Houses are under an equal obligation to keep pace with public opinion by crystalizing its aspirations into Acts of Parliament. Both Houses are equally bound to see that every Bill to which it gives its assent is expressed in language clear and unambiguous, that within it no dishonest principle lies concealed, and that behind it there are no selfish interests that can profit by it to the disadvantage of the public.

But while the legislative duties of both Houses are constitutionally equal, the usages of Parliament, which sometimes narrow as well as broaden down from precedent to precedent, have very largely limited the labors of the Second Chamber in Canada to the task of perfecting the legislation of the Lower House, or of amending measures designed to subserve political rather than public interests, or of delaying or rejecting legislation often too important in

character to be passed without a direct mandate from the people. Sir Alexander Campbell, in discussing the Quebec Resolutions, referred to the duties of the Legislative Council as follows:—

He did not think that one Legislative Chamber should bow to every breeze and constantly yield to every demand, and be content merely to reflect the temper and sentiment of the other branch. On the contrary, he held that when it had evidence sufficient to satisfy itself that the proposed measure was unjust, it was bound to resist, and public opinion, which generally came out right in the end, would sustain it in such an attitude. He did not say that at all times the Legislative Council should be a reflection of public sentiment, though it was, of course, desirable that it should not continue violently to shock it. He would have that House conservative, calm, considerate and watchful to prevent the enactment of measures which, in its deliberate judgment, were not calculated to advance the common weal.

Sir John Macdonald, speaking in the same Debate in the Legislative Assembly, said:

There would be no use in an Upper House if it did not exercise, when it thought proper, the right of opposing or amending or postponing the legislation of the Lower House. It would be of no value whatever if it were a mere Chamber for registering the decrees of the Lower House. It must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or

ill-considered legislation which may have come from that body, but which will never set itself in opposition to the deliberate and understood wishes of the people.

In the same Debate the Hon. George Brown used these words:

The desire was to render the Upper House a thoroughly independent body, one that would be in the best position to canvass dispassionately the measures of this House, and stand up for the public interest in opposition to hasty or partisan legislation.[1]

Speaking on senatorial appointments, in the Senate, on the 19th of March, 1877, Senator Wilmot, afterwards Speaker of the Senate, said:

The Senate should be in a position to check hasty legislation and mere popular clamor, and give time to allow public opinion to assert itself. We are not a mere recording body to register the Acts of the popular branch, but possess powers which the House of Lords did not possess. . . . While he fully believed the well-expressed views of the people should govern in the Dominion, at the same time he was prepared to act in such a way as he believed to be in the best interests of the country, whether it was in accordance with the views of the House of Commons of the day or not.

[1] "It is the very intention of our Constitution that the several branches of the Legislature should act as mutual checks upon each other, in order to prevent the too hasty adoption of measures of doubtful expediency; but when this check is interposed and felt, it is not unlikely to happen that persons of impatient and impetuous tempers look thenceforward with an unfavorable eye upon the barrier which obstructs the fulfilment of their wishes, and exert unscrupulously every effort to undermine or overturn it." (Sir John Beverly Robinson. See p. 239 *7th Report of Committee on Grievances, Legislative Assembly, Upper Canada*, 1835.)

In Mr. Stead's book entitled *Peers and People*, he says that the "first duty of a Second Chamber is to revise and correct the errors and straighten out the tangles in the legislation of the popular Chamber." This duty, he says, "demands impartiality, expert training, patience and industry."

Mr. Sidney Low was evidently of the opinion that the measures sent up by the House of Commons to the House of Lords were ill-digested and badly framed. In his work on *The Governance of England*, he says:

> With the conditions existing in the House of Commons, Bills are hustled through with half their clauses undiscussed, and the other half a mass of contradictions, of absurdities and inconsistencies. These ragged, amorphous measures may be cut and trimmed into shape in the House of Lords, and sent back again shorn of the excrescences fastened upon them by embarrassed Ministers, overwhelmed with work and distracted by the necessity of conciliating one or other section of their miscellaneous following.

I do not think that the Canadian House of Commons is open to such sweeping charges as Mr. Low has brought against the British House of Commons. Still, the numerous Amendments made to Bills from the Lower Chamber show that there is often some "trimming" to be done. The practice and procedure of the Senate

require that every Bill sent up by the House of Commons shall go through as many stages as if the Bill originated in the Senate itself. At each stage it is subject to criticism. The principle of the Bill, that is, its purpose as a matter of legislation, is fully discussed on the Second Reading; its details, or clauses, in Committee of the Whole House or before one of the Standing Committees of the Senate. Counsel is heard for or against it. If necessary, witnesses may be called to verify any of the statements it contains. It is open to amendment in Committee or on a Third Reading and can be rejected or referred back for reconsideration any time before it leaves the Speaker's hands. All the precautions which the experience of the astutest Parliamentarians considers necessary are taken to make it worthy of a place on the Statute Book.

The list of Senators who have performed this task since the Union, as shown in the Appendix, might safely be taken as a guarantee of the qualification of the Senate for its duty in this respect.

The second duty I will give in the words of Alexander Hamilton, of the *Federalist:*

> To secure stability and continuity in the policy of the Government and nation at home and abroad, and to

restrain the impulses of passion and the influence of factious leaders in promoting pernicious legislation.

For this purpose Hamilton says:

The Senate should be composed of men with mature experience, and comparatively independent of popular election.

Where to draw the line between the fervor of an enthusiast and the procrastinating habits of a Lord Melbourne is not an easy task. To know when to "take occasion by the hand" is among the highest gifts of statesmanship. The duty of "resisting the impulses of passion and the aggression of the mob," happily for Canada, has never been forced upon the Senate or House of Commons. Whether this even tenor of the public mind is a matter of temperament, or whether it is because Parliament has not—at all events, since Confederation—resisted to the breaking point popular demands, I cannot say. The experience of many countries shows that, under the influence of religious or political demagogues, Parliament has been compelled to adopt measures which were afterwards found to reflect upon its better judgment.

A very striking instance of the effect of a sudden impulse of passion in Great Britain was the enactment of the Ecclesiastical Titles Bill, for the purpose of restraining the alleged

encroachments of Roman Catholicism on the rights of the Protestant Churches. The excited state of public opinion on that occasion is very aptly described by Mr. Morley, in his *Life of Gladstone:*

> In the autumn of 1850 the people of this country were frightened out of their senses by a document from the Vatican dividing England into dioceses, bearing territorial titles, and appointing Cardinal Wiseman to be Archbishop of Westminster. Lord John Russell cast fuel upon the flame in a perverse letter to the Bishop of Durham. In this unhappy document he accepted the description of the aggression of the Pope upon our Protestantism as insolent and insidious, and wound up by declaring that the great mass of the nation looked with contempt upon the mummeries of superstition. As a result leave was given to introduce the Bill into the House of Commons by the overwhelming majority of 395 votes to 63. The weapon that had been forged in this blazing furnace by these clumsy armorers proved blunt and worthless. The law was from the first a dead letter, and it was struck off the Statute Book in 1871.

A similar wave of popular passion passed over the United States in 1898, from the destruction of the warship "Maine," in the harbor of Havana, Cuba. A cry went up from the Press and the platform, expressed in terms more forcible than elegant: "Remember the Maine! To hell with Spain!" This cry was too strong

for either Congress or the President to resist. War was declared, and what remained of the power of Spain in America was destroyed. In the light of subsequent events neither the action of the Parliament of Great Britain nor of the United States Congress has been justified by the sober second thought of the people.

A more common form of "pernicious legislation," to use the words of Hamilton, to which Parliament is continually exposed emanates from political intriguers who wish to use the power of Parliament for attaining their ends in defiance of all the well-known standards of public morality. Their success shows itself sometimes in large grants from the Public Treasury to gratify local ambition or to seduce political opponents by an appeal to their selfish interests. At other times it is seen in the alignment of constituencies, with a premeditated effort to secure a favorable expression of opinion not warranted by local conditions. It appeals to Provincial Legislatures, and to the people of a whole Province, by insidious offers of a largess for which there is no well-founded claim, but which may be used with excellent effect for political purposes. It even attempts to modify or subvert constitutional restrictions, in order that its power might be more effective. How often the Senate has been

called upon to resist legislation of this kind I am unable to say. If it has not proved to be the "strong and trusty bulwark" it should have been, it has failed to fill its place as the Second Estate of the Realm in the Constitution.

The third duty of the Senate, still quoting from Hamilton,

> is to preserve the portion of sovereignty remaining in the individual States (Provinces), and to act as a check upon the preponderance of the popular element.

I have already discussed at considerable length the constitutional obligations of the Senate towards the Provinces. Nothing would sooner destroy the confidence of the people in the national fabric, which has stood so successfully the test of experience for nearly half a century, than a subversion, either directly or indirectly, of the constitutional rights of any of its members. As the Provinces divested themselves of all the sovereignty which they enjoyed before the Union, except a small residuum which little more than preserved their identity, they surely ought to be allowed to enjoy the humble heritage that remained unimpaired. More than once, however, His Majesty's Privy Council has been appealed to for a determination of their constitutional rights against the encroachment of the Central Government.

Sir John Bourinot, in the introduction to his

work on *Parliamentary Procedure*, gives a number of instances, in which the respective jurisdiction of the Central and Provincial Governments was in this way settled, such as Provincial Jurisdiction over Inland Fisheries, Escheats, The Ownership of Indian Lands, The Control of Hotel Licenses, etc. With regard to a few of the cases mentioned, notably the control of hotel licenses, there was considerable irritation, and Parliament, in order to guard against infractions of the Constitution, has taken power to seek the advice of the Supreme Court in matters wherein its right of legislation was open to doubt.

But the attempt to encroach upon the jurisdiction of the Provinces as above stated has lately given place to the proposal by the Federal Government to assume certain functions of the Provincial Government, providing the Legislature of the Provinces and the Lieutenant-Governor in Council are assenting parties, the consideration in such a case being a special subsidy from the Federal Government. Now, such a proposal raises several constitutional questions:

1. Has Parliament authority, without Imperial legislation, to grant a subsidy to a Province to aid in the performance of duties for which the Province is already receiving aid under the Federal compact?

The treaty with the Provinces not only involved constitutional rights of Government, but also financial considerations. What right has Parliament to vary the financial considerations any more than the constitutional considerations? The British North America Act bound the Federal and Provincial Governments respectively to all its conditions and covenants. The Central Government became the custodian of certain revenues assigned to it for Federal purposes. The Provincial Governments agreed to receive certain subsidies in full of all the revenues which they relinquished. The funds so relinquished were to be applied by the Federal Government for the administration of Federal affairs. To use any portion of these funds for any other purpose without the consent of the several Provinces is certainly a breach of trust. It makes no difference whether the proposed subsidy is for one year or ten years, or in perpetuity. It is Federal money that is diverted from its constitutional channels without proper authority. In 1869 Mr. Blake, Leader of the Opposition in the Legislative Assembly of Ontario, moved a series of thirteen Resolutions, in which he laid down certain constitutional principles which he believed were violated by the Act granting what was known as "better terms" to Nova Scotia. Resolutions

6 and 8 contain the principle for which Mr. Blake contended:

Resolution 6.—That under the Union Act the public service of each Province shall be provided for out of the revenues thereof, and not out of the revenues of Canada, which were to be appropriated to the public service of Canada solely, and that thus the great grievance of the application of general funds to local services shall be removed for ever.

Resolution 8.—That the financial arrangements made by the Union Act, as between Canada and the several Provinces, ought not to be changed without the assent of the several Provinces.[1]

2. Can a Province surrender or transfer any part of its constitutional rights of jurisdiction under Section 92 of the British North America Act to the Federal Government for financial or any other consideration?

Parliament has an undoubted right, under Section 92 of the British North America Act, to assume control over works, although wholly situated within a Province, by declaring them to be "for the general advantage of Canada," or for the advantage of two or more Provinces. This provision was ostensibly made to enlarge the

[1]Mr. Blake moved a somewhat similar Resolution in the House of Commons in the same year which was defeated on a vote of 57 to 96. The validity of the Better Terms Act (32 & 33 Victoria) was referred to the Law Officers of the Crown, and, unfortunately, declared by them to be *intra vires* of the Constitution. (See *Journal of Legislative Assembly, Province of Ontario*, 1869.)

jurisdiction of the Federal Government in local matters. If the Federal Government should enter upon a work wholly situated within a Province without such a precaution, evidently it would be guilty of trespass.

The question arises: Is the consent of the Parliament of a Province equivalent to the power vested in the Dominion Parliament to take over local works under Section 92? I cannot find anywhere in the British North America Act that a Provincial Government has the right of voluntarily surrendering to the Federal Government matters of a merely local or private nature.

3. If the principle be admitted that the Dominion Government may take control of any matter contained in Section 92 over which the Province has exclusive jurisdiction, then there is nothing to prevent absorption, either piecemeal or in bulk, of all the powers of the Province under Section 92, and in this way bring under the Federal Government the Administration of Justice, Hotel Licenses, Municipal Institutions, Eleemosynary Institutions, Education, etc., and, in fact, change the Federal Union into *a Legislative Union*.

I do not propose, nor shall I attempt to exhaust, the full constitutional significance of the principle involved in the assumption by the

Federal Parliament of jurisdiction over Provincial matters.[1] The Judicial Committee of the Privy Council in the case of "The City of Montreal *v.* The Montreal Street Railway," declared:

(1) Sections 91 and 92 of the British North America Act indicate that the exercise of legislative power by the Parliament of Canada in the case of all matters enumerated in Section 91 was to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench on the classes of subjects enumerated in Section 92.

[1]A case illustrating the principle of the such assumption arose out of an Act (32 Vict. chap. I.) passed by the Ontario Assembly in 1869, under the Administration of Mr. Sandfield Macdonald, by which it was proposed to pay the Chief Justice of the Court of Error and Appeal and the Judges of the Superior Court of Ontario the sum of $1,000 annually in addition to the salaries allowed them by the Dominion Government. Sir John Macdonald, then Minister of Justice, advised the disallowance of this Act. In his report to the Privy Council he said, "By the 96th and 100th clauses of the Union Act it is provided that the Governor-General shall appoint the Judges of the Superior Courts and the Parliament of Canada shall provide their salaries, allowances and pensions; it would seem that the Judges of these Courts cannot properly, without a breach of these provisions, receive emolument from any but the power which appoints and pays the legal salaries attached to their positions." To remove all doubts, Sir John referred the matter to the Law Officers of the Crown, to which the following reply was received: "We are of opinion that it was not competent for the Legislature of Ontario to pass such an Act. We consider it inconsistent with Sections 92 and 96 of the British North America Act." It is to be regretted that no fuller reason was given than "inconsistency," and can only infer that the ground was taken that a Provincial Government had gone beyond the powers conferred upon it under Section 92 and had trespassed on the domain of the Dominion Government. If this be correct, and the Act were allowed to stand, the Dominion Government would be "surrendering" its exclusive power over the salaries of its own appointees, and the Provincial Government would be allowed to divert Provincial money to purely Dominion purposes. (See *Dominion and Provincial Legislation*, 1867-95, pp. 84, 91.)

(2) That to attach any other construction to the general powers which are conferred upon all Canada by Section 91 would practically destroy the autonomy of the Provinces.

(3) That if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which, in the different Provinces, are substantially of local or private interest, on the assumption that such matters also concern the peace and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of Provincial jurisdiction.

Lord Watson, in "The Canadian Pacific Railway Co. *v.* Bonsecours," said:

The Dominion cannot give jurisdiction or leave jurisdiction with the Province. The Provincial Parliament cannot give legislative jurisdiction to the Dominion Parliament. If they have it, either the one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other, or surrender jurisdiction to it.

Lord Davy adds "or curtail."

Mr. Benjamin, in the argument before the Privy Council in "Russell *v.* The Queen," said:

Whatever was domestic, whatever was private, whatever was Home Rule, was to be left to the Provinces. Their domestic institutions were not to be interfered with.[1]

[1]See Lefroy, *Canada's Federal System*, pp. 70-99.

CHAPTER V

COLLISION WITH HOUSE OF COMMONS

THE danger of collision between the Legislative Council (the Senate) and the House of Commons apparently gave the Delegates at the Quebec Conference no anxiety. In the Debates on the Quebec Resolutions in the Legislative Assembly, on this point Sir John Macdonald said:

> The Members of our Upper House will be—like those of the Lower—men of the people and from the people. The man put into the Upper House is as much a man of the people the day after as the day before his elevation. Springing from the people and one of them, he takes his seat in the Council with all the sympathies and feelings of a man of the people, and when he returns home at the end of the Session he mingles with them on equal terms, and is influenced by the same feelings and associations and events as those which affect the mass around him.

On the same day Sir Alexander Campbell, speaking in the Legislative Council, said:

> Our Legislative Councillors will not come from a class of society so different to the bulk of the population as the Peers of the British nation, as compared with the mass of the people of that country. The Lords have ideas of caste and privileges which none of our people

are imbued with, and the common sympathy existing between the two classes here will be felt equally by the Legislative Councillors and the Members of the Assembly. Both will be equally subjected to popular influences, and be more or less controlled by them. The interests of the Legislative Councillor [Senator], though a nominee of the Crown, would be the same as those of the mass. He would have no ancestral estates, immunities or titles to protect, like the Peers of England. He would be affected by the social changes which affect the others, and he would be moved by the same emotions and aspirations as his friends around him.

From these observations, it is evident that the Founders of Confederation trusted to the community of sentiment and equality of social standing which would necessarily exist between the Members of both Houses to prevent any collision in matters of legislation. Out of 304 Senators appointed since the Union, on the list to be found in the Appendix, not one can be said, either by heredity or factitious pre-eminence, to be less democratic than the chosen representatives of the people in the House of Commons. Very few, if any, represented either large estates or accumulated capital which would separate them in business or interest from their fellow citizens. The great majority were, either by necessity or choice, engaged in industrial or professional pursuits. Whether possessed of wealth or not, their wealth was not so much the

gift of the gods as the reward of their own efforts. They were neither absentee landlords, separated from their estates by the allurements of social life abroad or by the indulgence of luxurious tastes nearer home, nor were they plutocrats, fattening on the wealth acquired from unrewarded industry or piratical business enterprises. In no respect, either by education, environment or personal interests or pretensions, were they different from their fellow legislators in the Lower Chamber. Even were it desirable to constitute a Senate on the basis of the House of Lords, the raw material is not available. We have no dukes, marquises, viscounts or hereditary peers to draw upon. So when we invest the Senate with a certain power, we are merely investing the democracy with a second voice in the councils of the nation.[1]

Evidently Lord Carnarvon did not believe that the democratic character of the Senate was sufficient security against collision, and in this belief he was, no doubt, influenced by his experience in the House of Lords. Accordingly, he insisted that some provision should be made in the British North America Act to overcome such a contingency, should it arise.

[1] The numbers and rank of the members of the House of Lords at the present time (1910) are: Royal, 4; Archbishops, 2; Dukes, 21; Marquises, 23; Earls, 140; Viscounts, 47; Bishops, 24; Barons, 361. Total, 622. (See Marriott, *Second Chambers*.)

In the Conference at London, with the Canadian Delegates, we have the following account[1] by Mr. Wilmot, a Delegate from New Brunswick, of the introduction of the remedy contained in Sections 26 and 27 of the British North America Act. He said:

> It was debated by the Delegates in London for two days, and carried by a majority of one of the Representatives present, that some provision should be made to meet a deadlock between the two branches of the Legislature, should such a collision ever occur. The next day some of the members of the Delegation changed their opinion, and decided they would adhere to the Quebec scheme. Lord Carnarvon objected to the fixed character of the Senate, and he told the Chairman of the Delegation, Sir John Macdonald, that he hoped the Delegation would reconsider that point, and adopt some mode by which the difficulty could be got over. The Delegation returned to the Council Chamber, re-argued the question for another day, and arrived at the same conclusion as before. We again met Lord Carnarvon, and told him there had been no change of opinion, on which he expressed his regret and said he did not think the Act would be passed in that shape. After several meetings and long discussions, we finally agreed upon the Constitution of the Senate as it now stands in the Act, and to adopt the 26th Section as a safety valve in the event of a deadlock.

A few months after the Hon. Alexander Mackenzie assumed the Premiership, anticipating

[1] See *Senate Debates*, 1877.

the opposition of the Senate to legislation which he, no doubt, had in mind, he applied to the Colonial Office for power to create as many Senators as the Constitution allowed. Quoting from Todd on *Parliamentary Government in the Colonies*,

> in December, 1873, on the report of the Premier, Mr. Mackenzie, the Canadian Privy Council advised that an application should be made to Her Majesty to add six Members to the Senate "in the public interest." The Colonial Secretary, the Earl of Kimberley, in a despatch dated 18th of February, 1874, stated that it was intended that the power vested in Her Majesty, under Section 26 of the British North America Act, should be exercised in order to provide means of bringing the Senate into accord with the House of Commons in the event of an actual collision of opinion between the two Houses, and that Her Majesty should not be advised to take the responsibility of interfering with the Constitution of the Senate except upon an occasion when it had been made apparent that a difference had arisen between the two Houses of so serious and permanent a character that the Government could not be carried on without her intervention; and when it [also] could be shown that the limited creation of Senators allowed by the Act would supply an adequate remedy.

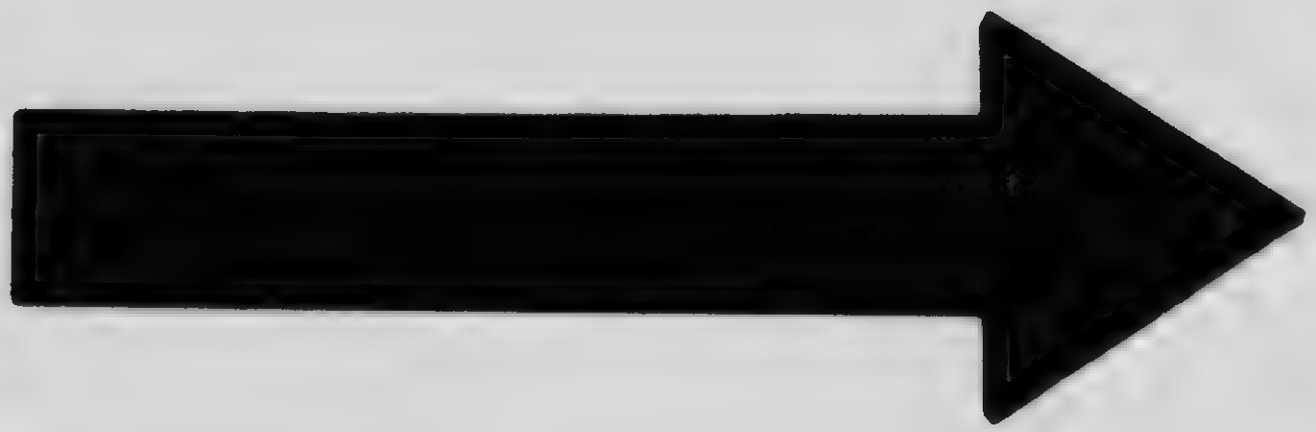
It is very much to the credit and honor of the Senate, in which the House of Commons shares as well, that, so far, it has not been found necessary to invoke even the limited power conferred by the British North America Act to

restore harmony between the two Houses, nor has the use of such power even been seriously considered, excepting once, since the Union, and that was by anticipation, as already mentioned.[1]

Besides the security against collisions with the House of Commons, afforded by its democratic character, we have an additional security in the division of the legislative powers of the Parliament of Canada and the Provincial Legislatures. Many questions which would necessarily come before a Second Chamber under a Legislative Union are excluded by this division of power under our Federal system. For instance, the Senate is relieved from considering the subjects assigned under Section 92, as being within the exclusive jurisdiction of the Provinces, such as The Maintenance of Prisons, Hospitals, Eleemosynary Institutions, Municipal Institutions, Hotel Licenses, Property and Civil Rights, The Administration of Justice and Education, all of which, in varied forms and in divers ways, have stirred up strife between the two Houses of the British Parliament.

Only in the case of education, when associated with denominational schools, is there any danger

[1] Sir Charles Tupper (see London *Times*, the 13th of August, 1909) is reported as saying that, "Mr. Mackenzie acknowledged that the Senate had used its powers to suspend rash and hasty legislation, rather than to check genuinely popular or national measures." (H. V. Timperley, *Senates and Upper Chambers*, note p. 225.)



of conflict with Provincial jurisdiction. The power conferred upon Parliament to provide remedial legislation where a Provincial Legislature deprives any religious body of rights enjoyed at the Union respecting denominational schools, still remains as a relic of pre-Confederation strife, from which the Senate is not entirely immune. The experience of the Government, however, in 1896, in attempting to redress the alleged grievances of the Roman Catholics in Manitoba, will probably deter for some time any Government from proposing similar legislation, which, however sound constitutionally, is liable to utter failure in the accomplishment of its purpose.

Notwithstanding the protection afforded the Senate by the Constitution, and the similarity in origin and status between the Members of the two Chambers, there have been cases, of public importance, in which the action of the Senate was regarded as a wanton interference with the prerogatives of the popular Chamber. I cite the following as among the most notable:—

1. The rejection of the Bill for the construction of the Esquimalt and Nanaimo Railway, during Mackenzie's administration.
2. The rejection of the Bill for the construction of a railway from Atlin to Dawson City, under the Laurier administration.

3. The Amendment of a Bill for the purchase of the Drummond County Railway, under the Laurier administration.
4. The Amendment of a Bill for the Improvement of Highways, under the Borden administration.
5. The postponement of the Naval Aid Bill, under the Borden administration.

As to the first three, it may be fairly said that their rejection or amendment, however much resented at the time by their promoters, is regarded by very few at the present time as deserving of censure. Of the first two neither was re-submitted. The third was so amended as to be acceptable on its re-introduction, and at the worst only delayed the purposes of its promoters one year. The fourth was twice amended, and the Amendments of the Senate twice rejected by the House of Commons, and the fifth was delayed until the verdict of the electors could be obtained on the dissolution of Parliament.[1]

[1] "Collisions between the two Houses of Congress are frequent. Each is jealous and combative. Each is prone to alter the Bills that come from the other; and the Senate in particular knocks about remorselessly those favorite children of the House, the Appropriation Bills. The fact that one House has passed a Bill goes but a little way in inducing the other to pass it; the Senate would reject twenty House Bills as readily as one. Deadlocks, however, disagreements over serious issues which stop the machinery of administration, are not common. They rarely cause excitement or alarm outside Washington, because the country, remembering previous instances, feels sure they will be adjusted, and knows that either House would yield were it unmistakably condemned by public opinion." (Bryce, *The American Commonwealth*, p. 188.)

In order to get a complete conspectus of the action taken by both Houses on the Bills which passed from one to the other, on the 30th of January, 1908, I asked for an Order of the Senate for a return showing—

1. Title of each Bill, by years, sent by the Senate to the House of Commons from 1867 to 1907 inclusive, that was—
   (a) Amended by the House of Commons;
   (b) Rejected by the House of Commons.
2. Title of each Bill sent by the House of Commons to the Senate for the same period that was—
   (a) Amended by the Senate;
   (b) Rejected by the Senate.[1]

From a careful analysis of this statement the following results are obtainable:—

(a) Total number of Bills sent up by the Commons, 1867 to 1913	5,871	
(b) Amended by the Senate	1,246	(or 21. 5 per cent.)
(c) Rejected by the Senate	113	(or 2 per cent.)

(a) Total number of Senate Bills sent to the Commons	1,294	
(b) Amended by the Commons.	396	(or 31.4 per cent.)
(c) Rejected by the Commons	113	(or 8.1 per cent.)

This statement shows that the House of

[1]By the courtesy of the Deputy-Clerk of the Senate, this statement was continued down to 1913.

Commons has been more drastic in its amendment and rejection of Senate Bills than the Senate has been of Bills sent up by the Commons. It is commonly said that the Senate has used its political majority adversely to the political majority of the House of Commons when the two Houses were not in accord, and on this supposition the charge of partisanship is made against the Senate. From 1867 to 1903 the Conservative Party was paramount politically in the Senate. For twenty-four years of that period the same Party was in control of the House of Commons. The analysis of the statement shows but very little difference in the number of Bills amended or rejected by the Sena luring those two different periods. For instance, in the twenty-four years of Conservative majority in both Houses—

1. The total number of Bills before the Senate was 2,569.

(a) Am . . . 673 (or 26.2 per cent.)
(b) Reje . d . 44 (or 1.7 per cent.)

In the twelve years with a Conservative Senate and a Liberal majority in the House of Commons—

2. The total number of Bills before the Senate was 1,261.

(a) Amended . 282 (or 22.3 per cent.)
(b) Rejected. . 44 (or 3.4 per cent.)

In the eight years with a Liberal majority in the Senate and a Liberal majority in the House of Commons (1903-11)—

3. The total number of Bills before the Senate was 714.

(a) Amended . 258 (or 36 per cent.)
(b) Rejected . 17 (or 2.3 per cent.)

In the two years with a Liberal Senate and a Conservative House of Commons (1912-13)—

4. The total number of Bills before the Senate was 415.

(a) Amended . 60 (or 14.4 per cent.)
(b) [1]Rejected . 1

Sidney Low, in his *Governance of England*, p. 82, speaking of the House of Lords, said:

When the Conservatives are in power the Peers are slow to interfere with any great political measure for fear of an advantage to the Party which the majority of their Members dislike and distrust. They remain languid and quiescent, with their constitutional functions largely in abeyance until the advent of a Liberal Ministry recalls them to activity, as it did in 1893. The standing Conservative majority in the House of

[1]During the two years of the Borden Administration one Bill was rejected by the Senate, in 1911-12—the Bill granting a subsidy to the Ontario & Temiskaming Railway. The Amendments made by the Senate to the Tariff Commission Bill and the Highways Bill were rejected by the House of Commons, and both Bills accordingly dropped. In 1912-13 the Navy Bill was delayed pending the dissolution of Parliament sooner or later. The Highways Bill was amended as in the previous year. The Bill for taking over railways that would serve as feeders to the Intercolonial Railway was also amended. In both cases the Amendments of the Senate were rejected by the House of Commons.

Lords then becomes of some effect, whether for good or evil It is on such occasions that resentment is roused by e spectacle of a privileged caste able to oppose pop. ' will.

The most partisan construction of the figures quoted above would not justify such a charge against the Senate as Mr. Low has brought against the House of Lords. But it may be properly argued that the rejection of a single Bill by a Party vote of the Senate might be of greater political significance than the rejection of a score of Bills, similar to those included in the return under consideration. Admitting the force of that argument, the fact that the Senate dealt with the Bills sent up by the House of Commons —no matter whether the Houses were in political accord or not—in nearly the same numerical proportions, shows that the Senate was neither more languid nor quiescent under one condition than the other.

A careful reading of the debates of either House would, I venture to say, remove much of the suspicion that the Senate was acting under Party influence either in the amendment or rejection of Bills sent up for approval.

CHAPTER VI

THE SENATE AND PUBLIC OPINION

It is said that because Senators are appointed by the Crown they have no right to amend, delay or reject the legislation of the popular Assembly. This statement arises out of a misconception of Parliament as a Legislative Body, of which the Crown is a necessary and fundamental part. The Crown itself is as much a creation of the people as either the Senate or the House of Commons, and has been placed in the exalted position it occupies for the purpose of giving stability and continuity to government. When the people, whose instrument it is, no longer require its services, they can dispense with it as with any other instrument of government. This they did once in the history of Great Britain in the days of Oliver Cromwell, and in recent years in France and Portugal. Under the British Constitution the Crown represents the people, and by a modern fiction of ancient law, without its assent nothing that the Senate and the House of Commons could do in the way of legislation would be binding upon the people. *Per contra*, the Crown, once so arbitrary, has conceded that

anything it is advised to do by the people constitutionally it is bound to do.

The people, having thus obtained control of legislation, decided to appoint as advisers of the Crown two selected bodies, styled the Senate and the House of Commons respectively. One of these groups they agreed should be chosen directly by themselves, the other nominated by the Crown.

Now, what was the motive for requiring two groups of advisers? Evidently the fear that under some impulse their direct nominees might act hastily; and so, for their own security and the welfare of the nation, the people invested this second group, the Senate, with power to reconsider and re-adjudge the conclusions arrived at by their representatives in the first instance, before they were submitted for the Assent of the Crown.

The people could not have intended that the Senate should be a dumb oracle, looking into space with no powers of articulation. If the people believed the Lower Chamber misinterpreted their opinions, or, acting on its own initiative, was in danger of jeopardizing their interests, or discharged its duties in a perfunctory manner, they expected this Second Body to correct its errors, or to delay action till they were heard from. In all these respects the Senate is acting for the people directly, not by

mere sufferance, as is sometimes hinted, but within the impregnable walls of the Constitution approved and confirmed by the people. Nor does experience, at least in Canada, show that the sober second thought of the people, as expressed by the Senate, was not in the last analysis found to be the opinion which stood the test of mature reflection, while it has happened more than once that the opinion of the House of Commons was rejected by the people on whose behalf, *par excellence*, it claimed to speak. For instance, the House of Commons in 1878, under Mackenzie, believed it represented public opinion on the national policy. The elections which followed proved it was mistaken. And so under Sir Mackenzie Bowell on the Remedial Bill in 1896, and under Sir Wilfrid Laurier on Reciprocity in 1911. On no occasion has the Senate been overruled by the electors, although it has often overruled the opinion of the House of Commons.

While the Senate cannot constitutionally ignore public opinion, it has a right to consider how that opinion is expressed, and to inquire if it is really Esau who asks for a blessing, or the crafty and avaricious Jacob. Public opinion is sometimes clamorous and strident in proportion to the means taken to give it voice. If the Senate could always feel assured that its

utterance was such as might be expected from the "Knights of the Round Table," who "reverenced their conscience as their King," it would have no difficulty in arriving at a conclusion. But as it can lay no such flattering unction to its soul, it must act with caution and reserve becoming the importance of the questions which come before it.

Professor William Sharp McKechnie, in his book on the *Reform of the House of Lords*, says:

> The chief function of the Lords [Senate] is to interpret the will of the people, not to oppose it. They claim the right to stand at times between the Electors and the Elected; to protect the voters from the actions of the servants they have appointed when these servants seem inclined to disobey instructions, or to go beyond the terms of their Commission. They claim the further right, under certain circumstances, not only to protect the people from their servants, but to protect them from themselves. They consider it their duty to delay the passing of ill-digested measures. This is practically to exercise the function of appealing from the Electors in the past to the Electors in the future, thus affording the constituencies an opportunity, under the influence of second thoughts, and perhaps of fuller information, of tempering their impetuosity by discretion. The Upper House thus throws out Bills, not because of its own estimate of their intrinsic faults, but also because of doubts as to how far the Commons have accurately interpreted the instructions received from their constituents at the last election, and if so, whether these instructions may not be modified at the forthcoming one. That such a function is at times useful hardly admits of

doubt. The exact direction of its usefulness is, however, somewhat changed in recent years, in consequence of the encroachments made by the modern Cabinet on the independence of the House of Commons. The House of Lords, which once stood guard over the actions of a too-powerful House of Commons, now stands guard over a too-powerful Cabinet. In these days of inflexible Party organization, enforced by threats of Dissolution, and by the habitual use of such harsh expedients as the guillotine, it is the Ministry of the day, and not the Lower Chamber of the Legislature, that threatens to become omnipotent. The House of Lords is the only barrier—a frail one, mayhap—that offers resistance to the framer of the Cabinet, unrestrained and uncontrolled.

But while the House of Lords, as well as the Senate of Canada, has the power to delay, by refusing its consent, the passage of Bills approved by the House of Commons, the Constitution provides means by which such power of delay should not be unreasonably exercised. In the case of the House of Lords, this power consists in the creation of new peers in sufficient number to overcome a dissenting majority, a power which it was proposed to exercise in the case of the Reform Bill in 1832, and in the case of the Parliament Bill of 1910, and of which significant intimations were given on different occasions between these two periods. In the case of Canada, it consists in the power of the Government to appoint six Senators, providing that

number is sufficient to prevail over an opposing majority.

In his last speech in the House of Commons, referring to the rejection by the Lords of the Home Rule Bill, Mr. Gladstone used these words:

> The question now is whether the judgment of the House of Lords is not merely to modify, but to annihilate, the whole work of the House of Commons, work which has been performed with an amount of sacrifice of time labor, convenience, and perhaps health totally unknown to the House of Lords. The issue which is raised between a deliberative assembly affected by the votes of more than six millions of people, and a deliberative assembly occupied by many men of virtue, many men of talent, is a controversy which, once raised, must go forward to its issue. No doubt there is a higher authority than the House of Commons. It is "the authority of the nation, which must in the last resort decide."

There are three conditions under which legislation reaches the Senate—

1. Legislation arising directly out of the policy of either Party on which it was sustained at the polls.
2. Legislation submitted to Parliament in the interval between elections, on the responsibility of the Government, which was not announced on a Party platform nor discussed before the electors.

3. Private legislation submitted by a Minister or private Member.

In regard to each of these three groups, the obligations of the Senate are of unequal force. Presumably, every measure contained in the first group has the endorsation of a majority of the people, expressed through the ballot-box, and binding on both Houses of Parliament—on the Senate equally with the House of Commons. Nevertheless, it may be the duty of the Senate to withhold immediate sanction, or even to negotiate with the sober second thought of the people for a modification of the terms in which the House of Commons rendered its voice articulate; but to ignore indefinitely public opinion would be for the Senate to belie its origin as a trustee for the people, and invite anarchy, if not revolution.

Looking over the whole field of legislation since Confederation, it is remarkable how few in number were the measures approved by Parliament which had the previous sanction of the people. In this category I am unable to find more than five of first-class importance, namely, The Admission of British Columbia and Prince Edward Island into Confederation, The National Policy, Vote by Ballot, and the Construction of the Canadian Pacific Railway.

With regard to the second group, the Senate

may properly take greater liberty. It fully recognizes that a Government exists by public opinion, and that it has the right to draw on that opinion, as on a bank account, till its credit is exhausted or further securities deposited. It remains, therefore, for the Senate to consider whether drafts made on the responsibility of the Government will be honored by the people, and so it takes the precaution sometimes to refuse its endorsation to a Government draft, or to reduce it in amount, so as to afford reasonable certainty that it will be met by the people at the proper time. When a Government measure is designed merely to regulate the business of administration, or to reform abuses or to redress grievances, of which the Government is likely to have fuller knowledge than any Member of the Senate, such a measure may be accepted with confidence, as the greater knowledge possessed by the Government is a substantial guarantee of its utility. No jealous fear that it would strengthen the Government politically should intervene. To allow such sentiments to prevail would be, as was said of Burke, "to give to Party what was meant for mankind."

It is worthy of notice that the legislation passed on the responsibility of the Ministers of the Crown is often of equal importance with that which public opinion has sanctioned in advance.

In fact, the greater part of the legislation on the Statute Book has no other source, of which the following may be taken as examples: The Confirmation of the Washington Treaty in 1871, The Franchise Act in 1885, The Railway Act in 1883, Preferential Tariff in 1887, The Transcontinental Railway Act in 1903, The Admission of Alberta and Saskatchewan into the Union in 1905, The Agreement with the United States for the Reciprocal Exchange of Certain Products in 1911, and the Naval Bill in 1912-13.

The third group requires but little comment. It has no public opinion to support it, and only its merits can commend it to the Senate. Private legislation, as a rule, is very limited in its scope. It derives its importance chiefly from some private object, such as the incorporation of companies for purposes of gain, public utility being a secondary consideration. In dealing with such legislation, the Senate is practically a jury, called upon to decide according to the evidence submitted on behalf of the interests concerned.

But the question here naturally arises: Is Parliament in duty bound to wait for the call of this mysterious autocrat—Public Opinion—before it enters upon any new field of legislation, or should it act on its own initiative and direct

public opinion in its aspirations toward the goal of a higher national life and achievement? To assume that the Senate and, for that matter, the House of Commons is in duty bound to watch the variations of public opinion, as a navigator watches the barometer, would be to rob both Houses of their individuality, and often to prejudice their judgment. And while both Houses are bound to keep step with all the progressive tendencies of an intelligent democracy, neither House should surrender its judgment at the dictum of the theorist or the alarmist. The claims made by Edmund Burke before the Electors of Bristol for perfect freedom of action as a Member of Parliament may with equal force be made by every Member of the Senate. Mr. Burke said:

> Certainly, gentlemen, it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication, with his constituents. Their wishes ought to have great weight with him; their opinion, his high respect; their business, his unremitted attention. It is his duty to sacrifice his repose, his pleasure, his satisfaction, to theirs, and above all ever, and in all cases, to prefer their interest to his own. But his unbiassed opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure, no, nor from the law and the

Constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you not his industry only, but his judgment, and he betrays, instead of serving you, if he sacrifices it to your opinion. . . . To deliver an opinion is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear, and which he ought always most seriously to consider. But authoritative instructions, "mandates" issued, which the Member is bound blindly and implicitly to obey, to vote and to agree for, though contrary to the clearest conviction of his judgment and conscience—these are things utterly unknown to all laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our Constitution. . . . Parliament is a "deliberative" Assembly of "one" nation, with "one" interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a Member indeed, but when you have chosen him, he is not a Member of Bristol, but he is a Member of Parliament.

CHAPTER VII

SENATE REFORM

THE British North America Act had scarcely passed the experimental stage before the House of Commons was called to consider the desirability of amending the Constitution of the Senate. On the 12th of April, 1874, Mr. David Mills, afterwards Minister of Justice and a Member of the Supreme Court, moved as follows:—

> That the House go into Committee of the Whole to consider the following Resolution: "That the present mode of constituting the Senate is inconsistent with the Federal principle in our system of government, makes the Senate alike independent of the people, and of the Crown, and is in other material respects defective, and our Constitution ought to be so amended as to confer upon each Province the power of selecting its own Senators, and to defining the mode of their election."

The debate on this Resolution was adjourned without any action.

In the Session of 1875 Mr. Mills repeated his Motion of the previous year, and, in a thoughtful and argumentative speech, urged its adoption by the House. He maintained that unless the

Provinces were directly represented in the Senate, the Federal compact was constitutionally imperfect; that a nominated Senate did not, and could not, afford that full and ample protection of Provincial rights which the Constitution of the American Republic gave to the various States of the Union, and that it was the duty of Parliament to revise the Constitution and rescue it from this anomalous condition. As this Motion was merely to consider a proposition to be unfolded later, the House, on a vote of 77 Yeas to 74 Nays, concurred and resolved itself into a Committee of the Whole, and then immediately arose, with power to sit again. As Mr. Mills was not prepared, apparently, to submit his scheme of Senate Reform in detail, the House was not again called into Committee, and his Motion was withdrawn.

From 1875 to 1905, a period of thirty years, the House of Commons appeared to be reconciled to existing constitutional conditions; but on the 30th of April, 1906, the subject was revived on the Motion of Mr. McIntyre, Member for Perth, in the following terms:—

> That, in the opinion of this House, the Constitution of the Senate should be brought into greater accord with the spirit of representative and popular government, and the genius of the Canadian people, by Amendments in future appointments:

1. Abolish the life tenure of Senators.
2. Limit the tenure of one appointment to within the legal term of three Parliaments.
3. Provide a fixed age, not exceeding eighty years, for compulsory retirement.

After a debate this Motion was withdrawn.

On the 30th of January, 1908, Mr. McIntyre again took up the subject in the following form, which was practically an expansion of his first resolution:—

That this House deems it expedient to invite the Honorable Senate to co-operate with it by means of Conferences or Joint Committees in giving consideration to the advantages to be gained by changes in the composition of the Senate, looking to—

1. An age limit for retirement, or a shortened term of service for future Senators.
2. An extension to other authorities than the present one of power to select persons for the filling of a portion of future vacancies in the Senate.
3. The rearrangement of some of the duties and work of the two Houses.
4. In making a recommendation in regard to those and other changes calculated to place the Senate in a position of greater usefulness and responsibility to the people.

This Motion was debated at some length, and the debate adjourned, but no further action taken.

In 1909, 1910 and 1911 Mr. Lancaster,

Member for Lincoln, took a bolder course and, after charging the Senate with many delinquencies, moved "that a Humble Address be presented to His Majesty declaring that the Senate is no longer required or advisable for the carrying on of responsible government in Canada, or a safeguard of His Majesty's full rights and prerogatives, and that the abolition of the said Senate would greatly conduce to the welfare of the Dominion of Canada, and promote the interests of the British Empire."

On a vote of 22 to 111, Mr. Lancaster's Motion was rejected in 1910 and dropped in 1911 without calling for the Yeas and Nays.

In 1909 Sir Richard Scott introduced the question into the Senate. He outlined a scheme of Senate Reform the first three paragraphs of which sufficiently indicate his object:

1. That in the opinion of the Senate the time has arrived for so amending the Constitution of this branch of Parliament as to bring the modes of selection of Senators more into harmony with public opinion.
2. That the introduction of an elective element, applying it approximately to two-thirds of the number of Senators, would bring the Senate more into harmony with the principles of popular government than the present system of appointing the entire body of the Senators by the Crown for life.

3. That the term for which a Senator may be elected or appointed be limited to seven years.

The remainder of the twelve Resolutions contained the details of how his scheme was to be practically applied. Although discussed without reserve, no vote was taken.

From a perusal of the Debates upon these Resolutions it will be found that the promoters of Senate Reform were obsessed by the idea that a Senate not responsible to the people by some form of election, either direct or indirect, might at any moment work irreparable injury to the Constitution. How to constitute a Second Chamber based on any direct form of responsibility which, at the same time, would contain the "checks and balances" which even the most democratic nations consider necessary to give stability and continuity to popular government has been the Gordian knot of the world's greatest statesmen. So far there has been no consensus of opinion as to how this can be done with perfect safety.[1]

In the British Constitution, the House of Lords provides "checks and balances" on the principle of hereditary succession. In the United States they are provided by a Senate

[1] "There is, perhaps, no more difficult question in practical politics, or one towards the solution of which the political thinker can give less help, than that of forming in a new country an Upper House."—PROFESSOR W. E. HEARN.

appointed by the State Legislatures; in France by a Senate representing a variety of interests; in Australia by a Senate elected by the whole Electorate of the State for a limited term. No two countries seem to adopt the same system. Some systems are democratic, some aristocratic, and some a combination of both. The most consistent with pure democracy is the Australian system.

Canada adopted the nominative system, as best suited to the relations which were about to be established between the Provinces and the Central Government. For this choice it had the experience of all the Provincial Governments for nearly three-quarters of a century, and the experience of Upper and Lower Canada under the Union Act of the elective system for a period of ten years. It had, besides, the Constitution of the United States Senate for its guidance.

After a further experience of forty-five years, the promoters of Senate Reform, with many more models to choose from than had the Quebec Conference, are apparently unable to agree upon any system or combination of systems on which the Senate should be remodelled. There does appear, however, to be a general agreement upon one point, that is, that the Constitution does not provide any machinery for maintaining

a political equilibrium between the Senate and the House of Commons, or even within itself. But is there any known system of constituting a Senate that does this?

In the United States, under election by State Legislatures, the relative strength of Parties in the Senate is far from constant. Radical changes, as in Canada, take place at long intervals. In the Fifty-fourth Congress (1895–97) 48.8 per cent. of the Senate was Republican. In 1903–05, 65.04 of the Senate was Republican.[1] In the Senate at the present date 53.12 per cent. is Democratic. The Republican Party has held control of the Senate for the last eighteen years, although the State Legislatures had power, indirectly, from the people of bringing about a change.

In Australia, where Senators are elected by popular vote on the same franchise as the Members of the House of Representatives, the Senate stood 22 Laborites to 14 Opposition in the last Parliament. In the present Parliament (elected 1913) the Senate stands 29 Laborites to 7 Liberals. Even under the direct elective system, as in Australia, the political equilibrium of Parties is not maintained.

It may be said, however, that both in the United States and in Au. tralia the opportunity

[1]G. H. Hynes, on the Election of Senators.

for adjustment comes more frequently than under the nominative system. That depends entirely upon the continuity of either Party in office. When Mackenzie took office in 1873, he found a Conservative majority in the Senate of 15, although in 1867 both political Parties were on an equality. During his term of five years he made 16 appointments, which partially restored the balance. When Sir John Macdonald resumed office in 1878, the Conservatives were still in a majority in the Senate, and in his second term of eighteen years he made 85 appointments. When Sir Wilfrid Laurier took office in 1896 there were only 13 Liberals in the Senate, and it was not until 1903 that the balance of political power in the Senate was transferred to the Liberal side. During his term of fifteen years Sir Wilfrid Laurier made 81 appointments, and when he retired in 1911 the Liberal Party had a majority of 39 in the Senate.

The equilibrium of Parties in the Senate largely depends upon the change of Party alignment in the House of Commons; but it does not necessarily follow, as was shown in the case of Australia, that an elective Senate will present the same Party alignment as the Lower Chamber although both are directly elected by the same franchise holders.

But is the preservation of a political equilibrium in the Senate essential to its efficiency, and to the suppression of what is called a partisan spirit? If appointments were made to strengthen the working force of the Party at elections, the nominative system would be invaluable to the Party that retained power for the longest period of time. But appointments are seldom or ever made for this purpose. Usually they result in the withdrawal from a Party of a portion of its working efficiency in political contests, and although the influence of the appointee so withdrawn is not entirely lost to his Party, he is under the conventional restraint of abstaining to a greater or less degree from active intervention in elections.

So jealous is Democracy in Great Britain of its right to speak for itself, that no Member of the House of Lords, unless he is an accredited leader, is supposed to discuss the questions dividing the rival Parties after the issue of the writs for a General Election, and to this disability is added the more invidious one of disfranchisement.

But as we are not confronted with any definite proposal to bring about any change in the Constitution of the Senate, an extended examination of how the Senates of other countries are constituted would be going too far afield. A consideration of the possibilities of the system

of appointment, which for many years to come will in all likelihood retain its present form, will be of more practical utility. What are the possibilities of the nominative system? And to what extent is it capable of promoting the efficiency of a Second Chamber? Rightly chosen in the true spirit of responsible government, a nominative Senate could be made the strongest bulwark of the Constitution, and the most impartial guardian of true democracy. It would have none of the hereditary weakness of the House of Lords, nor the partisanship of an Elective Chamber. There would be no limit to the qualifications of its Members, except the attainments of the people from whose ranks they are drawn.[1] It could command the services of experts in every walk of life. If it were necessary for its purpose to use the best talents of any profession or vocation to aid in legislation for the development of the natural resources of the country, or for protecting public health, or

[1] "The Senate is just what the mode of its election and the conditions of public life in this country make it. Its members are chosen from the ranks of active politicians, in accordance with a law of natural selection to which the State Legislatures are commonly obedient; and it is probable that it contains, consequently, the best men our system calls into politics. If these men are not good, it is because our system of government fails to attract better men by its prizes, not because the country affords or could afford no finer material. The Senate is in fact, of course, nothing more than a part, though a considerable part, of the public service; and if the general conditions of that service be such as to starve statesmen and foster demagogues, the Senate will be full of the latter kind, simply because there will be no others available."—WOODROW WILSON.

extending trade and commerce, or widening the horizon of citizenship, they were at its disposal. If men were wanted to cultivate the arts of peace, men who believe in a well-regulated democracy, whose patriotism was not subservient to Party; who were too just to obstruct legislation to the prejudice of the State, and too shrewd to be beguiled by the monopolist or the promoter, they would be available, if haply they could be found. With no obsequious bows as a condition precedent for appointment; with no marshalling of electors at the expense of time, health and—it may be—of honor, a nominative Senate with no promises to rise up in judgment when least expected, should be a perfect exponent of public opinion and the trustworthy guardian of the Constitution and all that it implies. To constitute such a Senate is one of the most solemn duties imposed upon Ministers of the Crown under the Constitution. The appointment of Lieutenant-Governors to represent His Majesty at Provincial capitals, and of a Judiciary to administer and interpret the laws of Parliament, are duties to be taken seriously, and can only be discharged properly by the use of just weights and balances. But will it be said that the creation of a co-ordinate branch of the High Court of Parliament, where all the interests of the people, personally and materially, pass in

review; where their liberty may be tampered with and seriously impaired, or their escutcheon besmirched; where "ship money," as in the days of Hampden, may be demanded to pay the intriguer for past services or purchase the favor of political parasites, is no less important than keeping the judicial ermine clean and the sanctity of the Bench undefiled? To attain these ends has always been the aim of genuine democracy, and if the House of Commons has any good ground of complaint against the Senate, it would be better statesmanship to use such remedial measures as it only can adopt before proposing reforms which are purely speculative and unsupported by precedent or the experience of any other country.

Having said so much on the structural reform of the Senate, it might be profitable to consider a few internal reforms which can be effected without any constitutional amendment. Mr. Stead, already referred to, says:

> That the second duty of the Senate is to act as a Legislature, taking its fair share in the burden of legislating for the nation. The more hopelessly clogged and broken down is the popular House, the more urgent is the need that the Second Chamber should relieve it of some portion of its task.

Either from design or oversight, it has been the policy of every Government since Confederation

to keep the Ministerial Benches of the House of Commons full and those of the Senate empty, or nearly so. Two Ministers at one time in the Senate is a very generous allowance, and more than once the Senate has been reduced to the leadership of a single Minister. In the British Parliament nearly every important portfolio is represented in both Houses, either by a Cabinet Minister in the Commons, or by an Under Secretary or some Member of the Administration in the Lords, or *vice versa*. It is not to be expected that the House of Commons would surrender its right of priority in the discussion of all the great measures of public policy. It is, *par excellence*, the People's Forum.[1] Men who have fought "on the ringing plains of windy Troy" fill its benches. They love the clash of steel and the blare of the trumpet calling them to action. In that arena they meet the chosen gladiators from the ranks of their opponents. Nowhere else would there be the same joy of battle, and the same applause from cheering comrades. By no process of devolution

[1] "The floor of the House is a battleground, where any man may fight his way to the front; the lists are set, and if he desires to compete for the prize of political distinction, he is free to enter. When he gets there, he plays his part upon a conspicuous stage; the theatre is open to the public eye, and the world is gazing upon the actor from day to day. Parliament gives him a platform and a pedestal; it sets him up in view of the nation, and invests him with a certain importance and a recognized status." (Sidney Low, *Governance of England*, p. 97.)

can the great questions that affect the life of the nation be removed from the popular Chamber. Outside these limits, however, there are many measures, of which the Statute Book furnishes abundant evidence, to the consideration of which the Upper Chamber can bring both knowledge and experience.[1] If such measures were first submitted to the sifting and testing processes of the Senate and its Committees, much time would, no doubt, be saved to the House of Commons. Unless, however, the Ministerial Benches of the Senate are more fully recruited, such a change cannot be brought about.

If no arrangement could be arrived at for a larger representation of Ministers in the Senate by the consent of both Houses, the presence of Ministers in each might be interchangeable for the purpose of introducing Government measures only, and of following them up and assisting in their passage in the different stages through which they proceed according to the rules of the House. This practice prevails in France, Germany, Italy, Spain, Belgium and Russia, and greatly relieves the Lower Chamber, in which—except, perhaps, in France—the majority of the Ministers are to be found, I think either House of Parliament would gladly

[1]According to the *Parliamentary Guide* (1912), of the 83 Senators on the roll, 28 sat at one time in the House of Commons, 16 in a Provincial Legislature, and 16 in both the Commons and a Provincial Legislature.

welcome the presence of a Minister who had an important Bill to submit for consideration. By this means the two Houses would be brought into closer contact, and obtain a clearer view of the proposed legislation, and, perhaps, also a clearer conception of the extent of the public opinion by which it was sustained. The personal relations of both Houses would be strengthened, and their usefulness increased, while more time would be at the disposal of the Ministers for purposes of administration.

As a means of reconciling the differences between the two Houses of Parliament in the Mother Country, the matter in dispute was sometimes referred to a joint Conference Committee for the purpose, if possible, of arriving at an understanding which would be acceptable to both Houses. The mode of conducting such a Conference in the Imperial Parliament is fully set forth in May's *Parliamentary Practice and Procedure*. A similar practice prevails at Washington. When any Bill, such as an Appropriation Bill or a Revenue Bill, which originates in the House of Representatives is not satisfactory to the Senate, each House appoints three of its Members to confer together, in order to agree upon a compromise measure. If they fail to agree, the measure drops. If they arrive

at a joint agreement, this agreement is referred back, and if approved takes the place of the original measure to which opposition was offered. A Conference between the two Houses at Washington assumes, sometimes, quite as much importance as the consideration of the original measure.

It has not been the practice in Canada, except on rare occasions, to attempt the settlement of differences between the two Houses by a Conference.[1] In many cases they are settled by a message from either House to the effect that its Amendments are not insisted upon; or, if insisted upon, by a message giving the reasons, to which a message is returned in support of the Amendments proposed. If the return message is not accepted, the Bill is withdrawn. If the practice were, however, introduced of more frequent Conferences between the two Houses

[1] "When each Chamber persists in its own view, the regular proceeding is to appoint a Committee of conference, usually consisting of three Members of the Senate and three of the House, sometimes, however, of a larger number. These six meet in secret, and generally settle matters by a compromise which enables each side to retire with honor. When appropriations are involved, a sum intermediate between the smaller one which the House proposes to grant and the larger one desired by the Senate is adopted. If no compromise can be arranged, and if the action of the President, who may conceivably give his moral support (backed by the possibility of a veto) to one or another Chamber, does not intervene, the conflict continues till one side yields or it ends by an adjournment, which, of course, involves the failure of the measure disagreed upon." (Bryce, *American Commonwealth*, vol. i. p. 189.)

the result would doubtless be that Amendments which are rejected could be so modified as to be acceptable, and the danger of irritation between the two Houses greatly reduced. It is so easy, and so natural, for two bodies of Legislators to believe that they are sustained in the one case by popular opinion and in the other by sound constitutional practice, to hold each other at arms' length, that public interests may occasionally suffer.[1] There is no reason why this should not be avoided as far as practicable. Both Houses have a common purpose. Neither is infallible in its judgments; and even when they differ on what appears to be good and sufficient grounds, there may be a middle course open to both without any sacrifice of their dignity or their independence. Talleyrand said that "Politics was the science of compromise." If a compromise is in any case necessary, or desirable, there is no better way for bringing it about than by a mutual exchange of opinion and a closer consideration of the matter in dispute from different standpoints. So far as I know,

[1] I am advised by the Deputy-Clerk of the Senate that only on two occasions did both Houses meet in conference, through representatives from each, to consider a question on which they were at variance: first in 1903, on a Bill to amend and consolidate the Railway Act, and again in 1909-10, on a Bill to authorize the Government to lease or acquire railways connecting with Government railways. In both cases a satisfactory agreement was concluded and accepted by both Houses.

the Senate has never refused to confer with the House of Commons when asked to do so, and before any Bill is rejected by either House, particularly if it is of immediate urgency, the resources of parliamentary procedure should be first exhausted.

CHAPTER VIII

AMENDING THE CONSTITUTION

THE Canadian Constitution, unlike the Constitutions of Australia and South Africa, does not provide any machinery whereby it can be amended, either by a plebiscite or by Parliament.[1] It may be that as it was the first experiment in Constitution-making on the Federal principle, the Imperial Parliament considered it best for all parties concerned to retain to itself the amending power. So carefully, however, was the Constitution framed that it has stood the test of experience practically, with but one Amendment, from its origin to the present time. Sir Wilfrid Laurier, in the House of Commons in 1907, in moving that an Address be presented to His Majesty for an Amendment to the British North America Act, by which the subsidies of the Provinces should be increased, said[2]:

[1] "Every proposed law for the alteration of the Constitution [of Australia] must be passed by an absolute majority of each House, and must then, after an interval of not less than two and not more than six months, be submitted to the electors in each State. The Amendment, to become law, must be approved by (1) a majority of States, and (2) by a majority of electors in the Commonwealth as a whole." (Marriott, *Second Chambers*, p. 177.)

[2] See *Debates of the House of Commons*, 1907, p. 5,290.

It is now more than forty years since the various Conferences took place which led to the foundation of the Canadian Confederation, and it is now exactly forty years since the Imperial Parliament, giving effect to the Resolutions which were adopted at the Quebec Conference, passed the British North America Act, which within its four corners contains the charter of the Dominion's rights, privileges and liberties. It is undoubtedly a matter of legitimate gratification and pardonable pride for us Canadians that nearly half a century has elapsed before any necessity has arisen for substantial alterations in the enactments of the original instrument, and this is undoubtedly also an evidence that the work which was undertaken and carried out by the men who arranged this Confederation was well done. In this respect we may claim that we have been more fortunate than our neighbors, for the ink was scarcely dry upon the Act of Union before new Articles were added to it, and almost simultaneously with the Act of Union ten Amendments had been added to the original instrument. Two more were added soon afterwards, and there were also three additional amendments added at a subsequent period as a result of the great Civil War, which took place some eighty years after the original contract was made.

In the same Debate the Hon. George E. Foster referring to the sanctity with which the Constitution should be regarded, said:

I do not think the ground is well taken, because the Constitution is once formed it must be like steel and iron, and never change. At the same time I quite agree with the Honorable gentleman [Sir Wilfrid Laurier], and

I think I am in agreement with the majority of the Members of this House when I say that the Constitution, under which different peoples agreed at a certain time to bind themselves to live their national lives together under a Federal compact, ought to be very respectfully treated, and that there ought to be more than a common reason for disturbing that Constitution. There may even be evils and weaknesses developed, but on the other hand, it sometimes is a question of pretty even balances, and whether it is not better to endure these evils, and to make head against the difficulties, rather than to tend towards frequent change, and thereby to gradual taking away from the sacredness and the inviolability of the Constitution and the compact, and making them a mere matter of agreement, that is liable to be changed from the stress of Party or political or financial or other exigencies.[1]

But while the Amendment to the Constitution in the last analysis rests with the Imperial Parliament, the preliminary stages by which it reaches the Imperial Parliament should be followed with the utmost care and deliberation.

[1]The rigid Constitution of the United States has rendered, and renders now, inestimable services. It opposes obstacles to rash and hasty change. It secures time for deliberation. It forces the people to think seriously before they alter it or pardon a transgression of it. It makes Legislatures and statesmen slow to overpass their legal powers, slow even to propose measures which the Constitution seems to disapprove. It tends to render the inevitable process of modification gradual and tentative, the result of admitted and growing necessities rather than of restless impatience. It altogether prevents some changes which a temporary majority may clamor for, but which will have ceased to be demanded before the barriers interposed by the Constitution have been overcome. (Bryce, *The American Commonwealth*, p. 407.)

As I understand the Constitution, these stages are three in number—

1. Consent of all the parties that merged their sovereignty or any part thereof in the Constitution.
2. Approval of the Amendments proposed by both Houses of the Parliament of Canada.
3. Ratification by an Act of the Imperial Parliament.

The doctrine of consent stands at the threshold—is, in fact, the flaming sword of the Constitution, which turns every way, and forbids progress till consent is clearly established. This doctrine is based on a long line of precedents, as well as on the fundamental character of the Constitution itself, as I have endeavored to show in Chapter III. The precedents reach back to the very beginning of the history of Canada. The terms of the capitulation of Quebec in 1759, the Quebec Act of 1774, and the Constitutional Act of 1791 received, as far as it was possible to be obtained, the prior consent of the people. The Union Act of 1841 and the British North America Act of 1867 were unquestionably framed according to the doctrine of consent, and if we examine the conditions upon which Great Britain acquired the right to be called the United Kingdom, it will be found that in the Union of Scotland and Ireland this principle was recognized. Even the transfer of

royalty from the Stuart Dynasty to the House of Orange was assented to and confirmed by the Parliament which inaugurated the Revolution of 1688.

Notwithstanding the obligations of the British North America Act as a treaty, and the important precedents to which I have referred, the Parliament of Canada has on several occasions taken questionable liberties with the Constitution. The first evidence of this disregard is to be found in an Act passed in 1869 to "grant better terms to Nova Scotia." For my purpose it is not necessary to question the justice of this Act, or the reasonableness of the terms granted, or the wisdom of pacifying Nova Scotia under the circumstances. There should be no wrong without a remedy. The *gravamen* of the complaint is not the remedy, but the needless wrench to the Constitution. Nor does the fact that the Law Officers of the Crown sustained the validity of the Act justify the course adopted, as subsequent events have shown.

The Hon. Mr. Holton, in an Amendment to the second reading of the Bill, laid down a constitutional rule which should be followed in such a case. It is as follows:—

> In the opinion of this House any disturbance of the financial arrangements respecting the several Provinces provided for in the British North America Act, unless

assented to by all the Provinces, would be subversive of the system of government under which the Dominion was constituted.[1]

The House declined, however, to accept Mr. Holton's Amendment. The passing of the Bill for the time being pacified Nova Scotia, but it opened the door to adjustments of the original subsidies contained in the Union Act whenever the financial or political exigencies of the Provinces were too powerful to be resisted. Twice since 1869 the public debt charged against the Provinces was reduced, or otherwise varied, and additional allowances made from the Dominion Treasury. The subsidy originally appropriated to Manitoba was increased six different times, and to Prince Edward Island three different times,[2] notwithstanding that, under Section 118 of the British North America Act, it was provided that the grants made to the Provinces "shall be in full settlement of future demands on Canada."

The only other case in which the application of the doctrine of consent would have been better constitutional practice than the course taken by Parliament, was in the erection of Manitoba into a Province in 1869, with representation in the Senate and the House of Commons. The

[1]See *Journals of the House of Commons*, 1869, p. 260.
[2]Sir Wilfrid Laurier, *House of Commons Debates*, 1907, p. 5,298.

power of the Parliament of Canada to erect a Province out of the North-Western Territories, which Canada had just then purchased from the Hudson Bay Company, was questioned by leading Members of the House, and in 1871 the Government brought down a Draft Bill for the approval of Parliament declaring the Manitoba Act valid and binding. The Hon. Mr. Mills took objection to the course proposed in a series of four Resolutions, the last of which laid down the principle of consent as an essential preliminary to all Amendments of the Constitution, as follows:—

> 5. That the representative Legislatures of the Provinces now embraced by the Union have agreed to the same on a Federal basis, which has been sanctioned by the Imperial Parliament. This House is of opinion that any alteration by Imperial Legislation of the principle of representation in the House of Commons, recognized and fixed by the 51st and 52nd Sections of the British North America Act, without the consent of the several parties that were parties to the compact, would be a violation of the Federal principle in our Constitution, and destructive of the independence and security of the Provincial Governments and Legislatures.[1]

It was not till 1907 that the Parliament of Canada formally admitted the doctrine of consent. The Subsidy Act of 1907, by which

[1]This amendment was rejected. See *Journals of the House of Commons*, 1871, p. 254.

the allowances to the Provinces provided in the Union Act were to be substantially increased, was based upon the assent of all the Provinces by their Legislatures or representatives[1] and thus Parliament recognized for the first time that the Union Act was a treaty, to be amended only with the consent of the parties that were bound by it.

Having established the first step in the procedure for the amendment of the Constitution, let us now consider the second step, namely, the approval of both Houses of Parliament. The Manitoba Act of 1869, already referred to, was introduced on the initiative of the Government, and carried through Parliament as a Government measure. To that course there could be no objection assuming that Parliament had the necessary constitutional power. Having some doubt as to their power to pass such a Bill, two years later (1871) the Government prepared a draft Bill to be submitted to the Imperial Parliament through the Colonial Office for confirming the Manitoba Act of 1869 without first asking the assent of both Houses of Parliament. Objection was taken to this course, as being a usurpation of the Executive Government and an abnegation of the functions of

[1]See *House of Commons Debates*, 1907, p. 5,299. (Sir Wilfrid Laurier.)

Parliament. That objection was expressed in the following Motion, moved by Mr. Holton:

> That no change in the provisions of the British North America Act should be sought by the Executive Government without the previous assent of the Parliament of this Dominion.[1]

This motion was adopted without a dissenting voice. The Executive Government immediately thereafter introduced the Draft Bill by an Address or Petition to His Majesty, to which the concurrence of both Houses of Parliament was required. The unanimous action of the House has thus settled the second step in the procedure for the amendment of the Union Act, namely, by Address from both Houses of Parliament.[2]

The third step in the procedure follows necessarily the preceding steps, and when completed brings all Amendments to the Union Act to the source from which its authority was originally derived. The question may very well be asked, can any Amendments be made to the British

[1] *Journals of the House of Commons*, 1871, p. 148. Vote: Ayes 137; Nays, nothing.

[2] In 1875, the Mackenzie Government, forgetting, apparently, the decision of the House in 1871, secured the passage of an Amendment to the British North America Act respecting the privileges, immunities and powers of the Senate and the House of Commons without an Address from Parliament, for which it was promptly censured by leading Members of the Opposition. (See *Debates of the House of Commons*, 1876, p. 1, 140.)

North America Act except with the consent of the Provinces? Technically speaking, I think not; but, as Burke says, "Legislation is a matter of reason and judgment." Where an Amendment does not curtail any treaty rights conceded to the Provinces, or impose additional obligations upon them, or where it wholly concerns the administration of Federal matters, the consent of the Provinces might be waived. At least, they would have no ground of complaint so long as any of their rights or privileges under the Constitution were not prejudiced by such an Amendment.

Having found a formula for all constitutional Amendments, if applied to the question of Senate Reform, the following results will be obtained:—

1. Before Parliament could entertain any proposal for Senate Reform, except as an academical one, the consent of all the Provinces should be obtained for the change which it was proposed to make.
2. The approval of both Houses of Parliament.
3. The ratification by the Imperial Parliament.

There can be no objection to the discussion of the question in either House of Parliament. It is educative, and keeps before the country the constitutional methods under which other countries are governed. It may even correct

apparent or real shortcomings of the Senate in matters of legislation. It may bring home to the Executive Government its responsibility in making appointments to the Senate, and it may show the futility of an agitation that is conducted on no definite plan, and to which, so far, there has been no positive public response.

APPENDIX

List of Senators contained in Her Majesty's Proclamation of 1867.

For the Province of Ontario.

John Hamilton.
Roderick Matheson.
John Ross.
Samuel Mills.
Benjamin Seymour.
Walter Hamilton Dickson.
James Shaw.
Adam Johnston Fergusson Blair.
Alexander Campbell.
David Christie.
James Cox Aikins.
David Reesor.
Elijah Leonard.
William McMaster.
Asa Allworth Bumham.
John Simpson.
James Skead.
David Lewis Macpherson.
George Crawford.
Donald McDonald.
Oliver Blake.
Billa Flint.
Walter McCrea.
George William Allan.

For the Province of Quebec.

James Leslie.
Asa Belknap Foster.
Joseph Noël Bassé.
Louis A. Olivier.
Jacques Olivier Bureau.
Charles Malhoit.
Louis Renaud.
Luc Letellier de St. Just.
Ulric Joseph Tessier.
John Hamilton.
Charles Cormier.
Antoine Juchereau Duchesnay.
David Edward Price.
Elzear H. J. Duchesnay.
Leandre Dumouchel.
Louis Lascote.
Joseph F. Armand.
Charles Wilson.
William Henry Chaffers.
Jean Baptiste Guévremont.
James Ferrier.
Sir Narcisse Fortunat Belleau, Knight.
Thomas Ryan.
John Sewall Sanbom.

For the Province of Nova Scotia.

Edward Kenny.
Jonathan McCully.
Thomas D. Archibald.
Robert B. Dickey.
John H. Anderson.
John Holmes.
John W. Ritchie.
Benjamin Wier.
John Locke.
Caleb R. Bill.
John Burinot.
William Miller.

For the Province of New Brunswick.

Amos Edwin Botsford.
Edward Barron Chandler.
John Robertson.
Robert Leonard Hazen.
William Hunter Odell.
David Wark.
William Henry Steeves.
William Todd.
John Ferguson.
Robert Duncan Wilmot.
Abner Reid McClelan.
Peter Mitchell.

List of Senators appointed by Sir John Macdonald, not including the official list contained in the Proclamation of 1867, down to 1873 inclusive.

Joseph E. Cauchon.
Jean Charles Chapais.
James Rea Benson.
John Glasier.
James Dever.
Archibald W. McLelan.
Alexander Macfarlane.
Jeremiah Northup.
Ebenezer Perry.
Frank Smith.
Ezra Churchill.
Louis Panet.
Robert Reid.
Marc. A. Girard.
John Sutherland.
Alexander R. C. de Lery.
Robert W. W. Carrall.
Clement F. Cornwall.
William J. Macdonald.
Henry A. N. Kaulbach.
Matthew H. Cochrane.
William Muirhead.
Alexander Vidal.
Pierre J. O. Chauveau.
Eugene Chinic.
George Alexander.
Joseph H. Bellerose.
Donald Montgomery.
Robert P. Haythorne.
Thomas H. Haviland.
George W. Howlan.
Francois X. A. Trudel.

List of Senators appointed by the Honorable Alexander Mackenzie, 1874 to 1878 inclusive.

George Brown.
Richard W. Scott.
Edward Goff Penny.
Pierre Baillargeon.
Charles Eugene Panet.
Hector Fabre.
Anselme H. Paquet.
Gardner Green Stevens.
Christian H. Pozer.
James D. Lewin.
Adam Hope.
Lawrence G. Power.
Robert P. Grant.
Charles A. N. Pelletier.
Joseph R. Thibaudeau.
William H. Brouse.

List of Senators appointed by Sir John Macdonald and his successors, from 1878 to 1896 inclusive.

Charles B. de Boucherville.
Harcourt B. Bull.
William J. Almon.
Hugh Nelson.
Jedediah S. Carvell.
John Boyd.
Thomas N. Gibbs.
Joseph Northwood.
George W. Howlan.
Thomas McKay.
Alexander W. Ogilvie.
James Skead.
Donald MacInnes.
Thomas R. McInnes.
John O'Donohoe.
John Schultz.
Louis Rodrigue Masson.
Josiah Burr Plumb.
Louis Robitaille.
Pierre Antoine De Blois.
Donald McMillan.
James Turner.
George C. McKindsey.
James Gibb Ross.

Alexandre Lacoste.
William McDonald.
Joseph Bolduc.
Theodore Robitaille.
James Robert Gowan.
Michael Sullivan.
Francis Clemow.
Pascal Poirier.
Charles Eusebe Casgrain.
Samuel Merner.
Lachlan McCallum.
Louis Adelard Senecal.
William E. Sanford.
John Jones Ross.
John Jos. Caldwell Abbott.
Pierre Fortin.
Jean Baptiste Rolland, Sr.
John Macdonald.
Richard Hardisty.
William Dell Perley.
James Reid.
Evans John Price.
George Alexander Drummond.
Charles Seraphin Rodier.
Edward Murphy.
Samuel Prowse.
Charles Arkell Boulton.
James Alexander Lougheed.
Louis Rodigue Masson.
Peter McLaren.
Hippolyte Montplaisir.
Joseph Tasse.
George William Howlan.
John Carling.
Jabez Bunting Snowball.
Andrew Arch. Macdonald.
John Dobson.
August C. P. R. Landry.
John Ferguson.
Alphonse Desjardins.
Thomas A. Bernier.
Clarence Primrose.
Mackenzie Bowell.
Auguste Real Angers.
John Nesbitt Kirchhoffer.
Donald Ferguson.
Kennedy Francis Burns.
Joseph Octave Arsenault
George Thomas Baird.
Josiah Wood.
James O'Brien.
Joseph O. Villeneuve.
William Owens.
Sir Wm. H. Hingston, Kt.
George Bernard Baker.
James Cox Aikins.
Michael Adams.
David MacKeen.
Sir John Carling.
Thomas Temple.
Louis J. Forget.

List of Senators appointed by Sir Wilfrid Laurier, 1896 to 1911 inclusive.

Sir Oliver Mowat, K.C.M.G.
Francois Bechard.
Alfred A. Thibaudeau.
David Mills.
George A. Cox.
John Lovitt.
George Gerald King.
Jean B. R. Fiset.
William Templeman.
Raoul Dandurand.
Joseph Arthur Paquet.
John Yeo.
James William Carmichael.
William Kerr.
Peter McSweeney.
George Taylor Fulford.
Joseph P. Baby Casgrain.
Robert Watson.
Findlay M. Young.
Charles Burpee.
Joseph Shehyn.
Arthur Hill Gillmore.
John Valentine Ellis.
Robert Mackay.
Andrew Trew Wood.
Lyman Melville Jones.
George McHugh.
George Landerkin.

Joseph Godbout.
Arthur Miville Dechene.
James Edwin Robertson.
Charles Edward Church.
Frederick Pemberton Thompson.
Frederick Louis Beique.
William Gibson.
James McMullen.
Joseph Hormidas Legris.
Francis Theodore Frost.
James Kirkpatrick Kerr.
Thomas Coffey.
Rufus Curry.
Jules Tessier.
William Cameron Edwards.
James Domville.
James D. McGregor.
Laurent Olivier David.
Henry Joseph Cloran.
William Mitchell.
John Henry Wilson.
Thomas Reuban Black.
Hewitt Bostock.
Sir Richard John Cartwright.
Philippe Auguste Choquette.
James Hamilton Ross.
Thomas Osborne Davis.
William Ross.
Robert Jaffray.
L. George De Veber.
James Moffat Douglas.
Philippe Roy.
Peter Talbot.
George Riley.
John Costigan.
George William Ross.
Robert Beith.
Daniel Gillmor.
Ambroise Hilaire Comeau.
George Casimir Dessaulles.
Napoleon Antoine Belcourt.
Archibald Campbell.
Daniel Derbyshire.
Valentine Ratz.
Noe Chevrier.
Arthur Boyer.
Benjamine Prince.
Edward Matthew Farrell.
William Roche.
Louis Lavergne.
Benjamine C. Prowse.
Amedee Emmanuel Forget.
Joseph Marcellin Wilson.

List of Senators appointed by the Honorable R. L. Borden, 1911 to date.

Adam Carr Bell.
Alphonse A. C. La Rivière.
George Taylor.
Rufus Henry Pope.
John Waterhouse Daniel.
Henry Corby.
George Cordon.
Nathaniel Curry.
William Benjamin Ross.
Edward Lavin Girroir.
William Dennis.
William McKay.
Patrick Charles Murphy.
Ernest D'Israile Smith.
Alexander McCall.
James Mason.
James J. Donnelly.
William H. Thorne.

The number of Senators on the roll at the date of the last *Parliamentary Guide* (1912) was 83. Of these—

2 were under 50 years of age.
14 over 50 and under 60 years of age.
24 over 60 and under 70 years of age.
32 over 70 and under 80 years of age.
11 over 80 years of age.